

UNITED STATES
DEPARTMENT OF JUSTICE

Drug Enforcement Administration



LESSON PLAN

Handling Sensitive Information



N
In the old days, classified material was poison. In some ways, it still is...because if used correctly, it can screw up our investigation. [REDACTED]

(b)(7)(E)

SAR-C-13-0125

Classification Levels	
<u>Classification Level</u>	<u>Impact on National Security</u>
TOP SECRET	Exceptionally Grave Damage

Three basic levels of classification. Material is classified to protect the collection sources and methods of national assets. The more sensitive or valuable the source/method, the higher the classification.

--At DEA, Top Secret material is rare indeed. Only the folks in a SCIF (a facility for special information) see it here in DEA [REDACTED]

(b) (7) (E)

So, it is clearly NOT meant to be used in court -- which is a very public place. So it underlines WHY Parallel Reconstruction is so important.

Project

Sept 2008



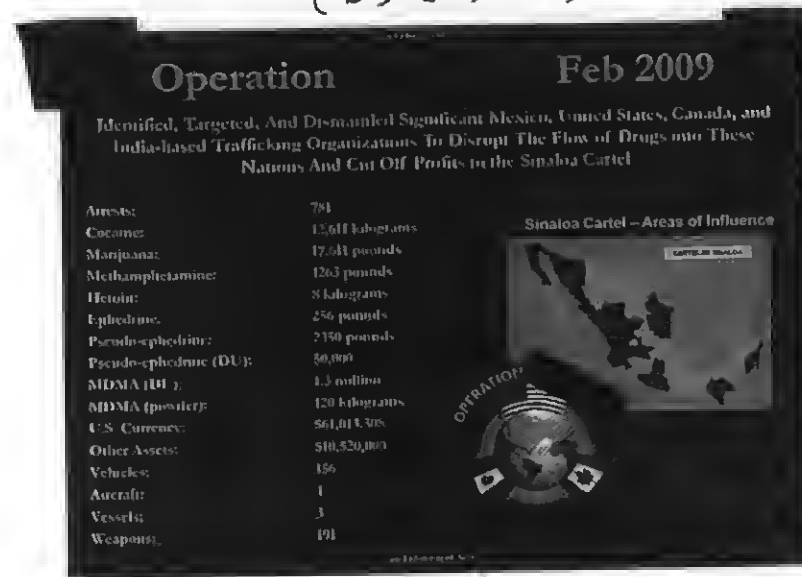
Separate Operations
Targeting the
GULF CARTEL

Arrests:	626
Cocaine:	17,347 kilograms
Marijuana:	64,271 pounds
Methamphetamine:	1,310 pounds
Heroin:	8 kilograms
Other Assets:	\$30,000,000
Vehicles:	266
Currency:	\$83,602,312
Weapons:	934
Indicted CPOTS:	3
Wiretaps:	400
SOD Funding:	\$7,565,696

(b)(7)(E)

different operations targeting the Gulf Cartel interrelated thru Several DTO contacts.....

(b) (7) (E)



Targeting DTO cells of the SINALOA CARTEL operating in four distinct countries

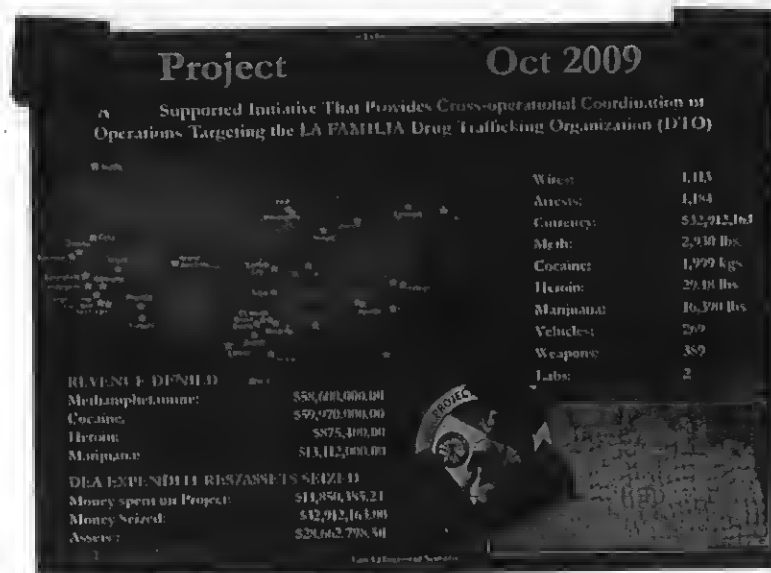
MEXICO

USA

CANADA

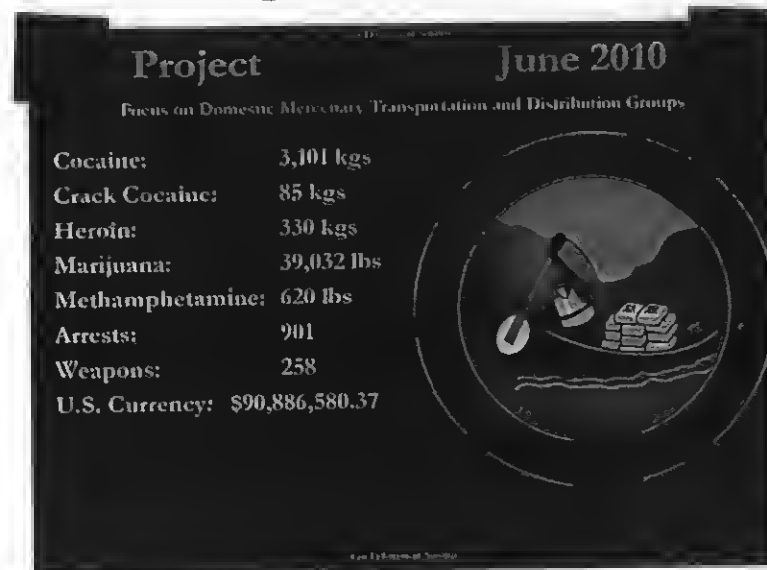
INDIA

(b)(7)(C)



Connecting the dots from multiple operations and cases in over 30 US cities targeting LA FAMILIA

(b)(7)(E)



And more recently targeting all cartel operations within the USA in an effort to prevent any one DTO expanding it's influence while DEA targets another...

6

(b)(7)(E)

Project June 2011
A 20-Month Multi-Agency Investigation Targeting the
LA FAMILIA MICHIGANA Drug Cartel


Arrests:	1,985
Currency:	\$62,000,000
Meth:	2,773 lbs
Cocaine:	2,722 kgs
Heroin:	1,005 lbs
Marijuana:	14,818 lbs

DEA RELEASED
OCTOBER 14, 2011
APPROXIMATELY
12:00 PM

DEA EXPENDITURES/ASSETS SEIZED:
Money spent on Project: \$29,000,000.00
Money Seized: \$63,851,102.00

BATF ON DETAIL

PROJECT



Project [REDACTED] is the result of the 2009 effort noted earlier as Project [REDACTED]

Multi Agency project, spearheaded by [REDACTED]. Agents and analysts from the DEA, FBI, ICE, IRS

Customs and Border, U.S. Marshals, as well as attorneys from the Criminal Division's Narcotic and Dangerous Drug Section and Office of International Affairs.

More than 300 federal, state, local and foreign law enforcement agencies contributed investigative and prosecutorial resources to Project [REDACTED] through the Organized Crime Drug Enforcement Task Forces.

PARALLEL RECONSTRUCTION

What do I do with this classified stuff?



I'm not here to tell you any thing really new, just to reinforce some of the tactics you've learned over the years and that they can be applied to Class material as well. The world has changed a lot since I've been with DEA. In the old days, classified material was poison. In some ways, it still is...because if treated in correctly, it can screw up your investigation

[REDACTED]

[REDACTED]

[REDACTED]

(b)(7)(E)

(b)(7)(E)

The Devil's in the Details

- We dismantle criminal organizations through enforcement and prosecution.
- Unclassified material can be used in court
 - Sources and methods are revealed
- Classified Material must be protected
 - Sources, Methodologies and Technologies
- To use it, we must protect it, or lose it.

Our friends in the military and intelligence community never have to prove anything to the general public. They can act upon classified information without ever divulging their sources or methods to anyone outside their community. If they find Bin Laden's satellite phone and then pin point his location, they don't have to go to a court to get permission to put a missile up his nose.

We are bound, however, by different rules.

Our investigations must be transparent. We must be able to take our information to court and prove to a jury that our bad guy did the bad things we say he did. No hiding here. However, we are also bound to protect certain pieces of information so as to protect the sources and methods.

To use it...we must properly protect it.

OK. A couple questions. If you get a phone number on a DEA-6 – a report of investigation, how can you use it? Can we reference the number on a subpoena or warrant (yes)?

PARALLEL RECONSTRUCTION

What do I do with this classified stuff?



The world has changed a lot since I've been with DEA. In the old days, classified material was poison. In some ways, it still is... because if treated in correctly, it can screw up your investigation

[REDACTED]

[REDACTED]

(b)(7)(E)

1 (b)(7)(E)

The Devil's in the Details

- We dismantle criminal organizations through enforcement and prosecution.
- Unclassified material can be used in court
 - Sources and methods are revealed
- Classified Material must be protected
 - Sources, Methodologies and Technologies
- To use it, we must protect it, or lose it.

Our friends in the military and intelligence community never have to prove anything to the general public. They can act upon classified information without ever divulging their sources or methods to anyone outside their community. If they find Bin Laden's satellite phone and then pin point his location, they don't have to go to a court to get permission to put a missile up his nose.

We are bound, however, by different rules.

Our investigations must be transparent. We must be able to take our information to court and prove to a jury that our bad guy did the bad things we say he did. No hiding here. However, we are also bound to protect certain pieces of information so as to protect the sources and methods.

To use it....we must properly protect it.

OK. A couple questions. If you get a phone number on a DEA-6 – a report of investigation, how can you use it? Can we reference the number on a subpoena or warrant (yes)?

United States Department of Justice

Drug Enforcement Administration

Legal Training Section

Justice Training Center

Lesson Plan Face Sheet

TITLE OF INSTRUCTION: Handling Sensitive Information.

TIME ALLOTTED: 1 or 2 hours

TARGET GROUP: Basic Intelligence Research Specialist (BIRS) and Federal Law Enforcement Analysts Training (FLEAT); Intelligence Analyst and Supervisor In-Service Training

INSTRUCTOR: Legal Instructor (b)(6)

METHODS OF INSTRUCTION: Lecture, Discussion, PowerPoint presentation and Handouts

DATE:

June 4, 2007
(b)(6)

PREPARED BY:

(b)(6)

Legal Instructor

APPROVED BY:

(b)(6)

6-18-07

Section Chief

(b)(6)

6/29/07

Deputy Chief Counsel for Operational Law

Fair Use Statement:

Copyrighted materials contained in this lesson plan are strictly utilized for educational purposes only as covered by Section 107 of Title 17 of the U.S. Code.

(b)(6)

11/27/07

Date

SECTION I

OBJECTIVES

A. OVERALL SUBJECT OBJECTIVES:

The most perplexing problem in combining the collection capabilities of the Intelligence Community (IC) with the enforcement objectives of Law Enforcement Agencies (LEAs) is using IC information in LEA investigations without disclosing or unduly risking disclosure of sensitive or classified IC information. This block of instruction will introduce students to legally acceptable methodologies for handling this problem.

B. LEARNING OBJECTIVES:

1. Identify the four methods discussed in this class of combining Intelligence Community (IC) information with law enforcement agency (LEA) information for the benefit of LEA investigations.
2. Articulate that the Federal Rules of Evidence (FRE) and the Federal Rules of Criminal Procedure (FRCP) contain enough flexibility to permit a trial judge to limit or restrict discovery, including the discovery of national security or classified information.
3. Articulate that one way to protect IC information collection efforts from disclosure in criminal trials is to (b)(7)(E) IC information from LEA investigations.
4. Articulate that the Classified Information Procedures Act (CIPA) protects IC sources and methods; identify CIPA's limitations in this regard.
5.

Non Responsive
6. Articulate that the concept known as "parallel construction" can shield information that might otherwise be discoverable from the discovery process

ITEMS AND MATERIALS

- A. ARTICLES: None.
- B. AUDIOVISUAL AIDS: PowerPoint presentation; requires a computer, a projection device and a screen.
- An easel and butcher block paper.
- C. HANDOUT MATERIALS: Workbook for taking notes from PowerPoint slides.
- D. OTHER: A Take-Home/Turn-in Quiz.

Handling Sensitive Information

A. INTRODUCTION.

1. SELF-INTRODUCTION: I am (b)(6) of the Legal Instruction Section, DEA Academy.
2. ATTENTION-GETTER/"GRABBER": In previous classes we have discussed how the Intelligence Community (IC) and federal law enforcement agencies (LEAs) can work together. We have also discussed the *new*, post-9/11 national consensus concerning sharing information between federal agencies, including sharing information between the IC and LEAs for the purpose of prosecution. In this class we will discuss what happens when the new national consensus concerning information sharing meets the American constitutional and statutory requirements for an open and fair criminal trial.
3. NEEDS STATEMENT: This class introduces intelligence analysts to several tried and true ways that IC information may be used in law enforcement investigations and prosecutions.
4. THESIS STATEMENT: The IC does not routinely work to help LEAs make their cases. The reason for this is that the sources and methods that produce IC information must be protected from disclosure for practical reasons (to help ensure our intelligence activities are effective) and by law (federal statutes require the IC to protect its sources and methods). Nonetheless, in many areas (counterterrorism and counterespionage come to mind), the IC and LEAs work together with the understanding that one of their common objectives is to prosecute wrongdoers. Our government has worked out procedures to accommodate the sharing of IC information with LEAs for criminal investigations. Intelligence analysts need to be familiar with how these procedures and statutes work.
5. PREVIEW. This one or two-hour presentation will introduce the students to the fundamentals of using IC information for LEA investigations and prosecutions in a manner that protects IC sources and methods from disclosure in court.

B. BODY.

1. **General.** Introduce students to the procedure known as (b)(7)(E) remind them of (or depending on the knowledge of the audience, introduce them to) the Classified Information Procedures Act (CIPA) and the Foreign Intelligence Surveillance Act (FISA). Demonstrate to them four special techniques that allow some form of information sharing between the IC and LEAs when prosecution is their common objective.
2. **Body.** Discuss the basic problem in using IC information in LEA investigations and four solutions to this problem.
 - a. The problem.
 1. The IC and LEAs have different goals. The key difference is that LEAs expect the result of their work to be presented in open court, that is, LEAs expect the information they collect to be transparent because much of it will be introduced in court as part of the prosecution case against a defendant. The IC expects that the product of its work will not appear in court, that is, the IC's objective is for its work product is that it not be transparent.
 2. Rules of discovery in criminal cases in federal courts (the IC's nemesis). Defendants are entitled to:
 - (a) Anything used at trial, Federal Rule of Criminal Procedure (FRCP) 16.
 - (b) Oral, written or recorded statements of the defendant, FRCP 16.
 - (c) Results of tests -- medical, scientific, etc., FRCP 16.
 - (d) Exculpatory information, *Brady v. Maryland*, 373 U.S. 83 (1963).
 - (e) Impeachment of witnesses, *Giglio v. United States*, 405 U.S. 150 (1972).
 - (f) Statements of witnesses, *Jencks v. United States*, 353 U.S. 657 (1957).

- (g) Illegally obtained evidence (18 U.S.C. § 3504).
 - (h) Authentication (chain of custody).
3. What are the consequences for trial if some of the above described information is classified information that is derived from IC collection efforts?
- (a) The defendant may be entitled to it no matter how highly classified it is; this fact has given rise to a concept known as *Graymail*.
 - (b) Graymail is the common term for a maneuver available to defendants who have access to classified information due to the nature of their employment (and are being prosecuted for criminal acts related to their employment) or who obtain access to classified information via pretrial discovery motions. In a graymail defense, the defendant forces the Government to either allow the classified information to be presented by the defense in open court or to drop the case (or the charges that are related to the classified information).
- b. Some solutions to the problem.
- 1. The Classified Information Procedures Act (CIPA).
 - (a) “CIPA was designed to establish procedures to harmonize a defendant’s right to obtain and present exculpatory material upon his trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d. 795 (2nd Cir. 1996).
 - (b) “CIPA was enacted in 1980 to combat the problem of ‘graymail,’ an attempt by a defendant to derail a criminal trial by threatening to disclose classified information . . . (noting that [the] problem of graymail is not ‘limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same ‘disclose or dismiss’ dilemma”

(citations to legislative history omitted). *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004).

- (c) CIPA does not create any new evidentiary rules; in fact, CIPA relies on the Federal Rules of Evidence (FRE) especially those governing relevancy.
- (d) Let's review the FRE concerning *relevant evidence*.
 - (i) FRE 401 contains the definition of the term relevant evidence: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable that it would be without the evidence.
 - (ii) FRE 402 states that relevant evidence is generally admissible and irrelevant evidence is inadmissible.
 - (iii) FRE 403 permits the judge to exclude relevant evidence on grounds of prejudice, confusion or waste of time.

Teaching points: relevant evidence can be excluded; therefore, relevant *classified* evidence can be excluded.

- (iv) The *relevance* of classified information (that may or may not be evidence in accordance with the FRE) under CIPA is determined as if the information was not classified. "When determining the use, relevance and admissibility of the proposed evidence, the court may not take into account that the evidence is classified; relevance of classified information in a given case is governed solely by the standards set forth in the Federal Rules of Evidence." *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1326, n.2 (D.N.M. 2000).

Teaching Points: the students should be asked to explain in class what the above quotation means in plain English. This is an important concept that must be understood by the students; it means

that the fact that the information is classified is not enough in itself to resolve the issue of relevance or admissibility.

- (e) When evaluating classified information under FRE and CIPA, the court first focuses on FRE relevancy standards, then focuses on the type of relevant information that is useful to the *defense strategy*.
 - (i) “Under CIPA, the court must use existing standards for determining relevance and admissibility . . . The terms of this statute indicate that evidence may be excluded under F.R.E. 401 as irrelevant. Evidence may also be excluded under F.R.E. 403 as prejudicial, misleading, and confusing . . . The fact that the information in question is classified should not be considered when determining its admissibility . . . Lopez-Lima bears the burden of showing the admissibility of his section 5 information [of CIPA] . . .” *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D. Fla. 1990).

Teaching Points: the defendant must notify the prosecution under section 5 of CIPA with some specificity of the classified information that the defendant intends to use in his defense (*see United States v. Badia*, 827 F.2d 1458, 1466 (11th Cir. 1987) (failure to comply without justifiable reason means the defendant cannot raise “matters at trial that should have been noticed pursuant to CIPA”). Nonetheless, the defendant still has the obligation of convincing the court that this information is admissible under the FRE.

- (ii) “If the court determines that classified information is admissible under section 6(a) [of CIPA], the government may move for permission to substitute a summary or admission of relevant facts under section 6(c)(1). The court must grant a section 6(c)(1) motion, if it finds that the statement or summary will provide the defendant with ‘substantially the same ability to make his defense as would disclosure of the specific classified information.’ *Id.*, § 6(c)(1). If the section 6(c) motion is denied, the government can require the

defendant not disclose the classified information. *Id.*, § 6(e)(1). Then, the court must dismiss the indictment, unless the government convinces the court that justice would not be served by the dismissal. *Id.*, § 6(c)(2).” *United States v. Lopez-Lima*, 738 F. Supp. at 1414.

Teaching Points: the government can protect admissible classified evidence with unclassified substitutions or admissions of fact. The court must be satisfied that they give the defendant “substantially the same ability” to make his defense as would the classified information itself.

- (iii) “For the reasons articulated, the court concludes that Lopez-Lima’s version of the events, if credited by the jury, establishes an affirmative defense to the aircraft piracy charge against him and negates the wrongful intent necessary to secure a conviction on that charge. The classified information Lopez-Lima seeks to introduce clearly is relevant to his defense, as it would tend to show that the CIA sanctioned the hijacking or that he reasonably believed that it did. Of course, while the classified information is relevant, it may not be persuasive before a jury . . . Notwithstanding, Lopez-Lima is entitled to have a jury consider the theories and evidence that he marshals in his defense . . . The court determines that Lopez-Lima is not precluded by F.R.E. 403 from introducing this classified information.” *United States v. Lopez-Lima*, 738 F. Supp. at 1414.

Teaching Points: if the classified information itself is relevant evidence, the government must produce it (this is the majority position; the minority position, discussed below, provides an additional balancing test at this point). The court makes this decision by focusing on the nature of the defendant’s defense. The government also can punt, that is, the government can forgo the prosecution or the parts of it that are related to the classified information when the court finds that classified information is relevant and material to the defense. *United States v. Fernandez*, 913

F.2d 148, 164 (4th Cir. 1990) (“The district court acted within its discretion in determining that the government’s attempt to exclude evidence necessary to demonstrate this background [context of defendant’s allegedly false statements], as well as its effort to require the defendant to use abbreviated and lifeless substitutions for this crucial evidence, would have deprived Fernandez of any real chance to defend himself”).

- (f) For classified information that may be admissible, CIPA permits pre-trial, *ex parte*, *in camera* review of classified information to determine its admissibility. “CIPA creates a pretrial procedure for ruling upon the admissibility of classified information.” *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1260 (9th Cir. 1998); “The Classified Information Procedures Act . . . provides for pretrial procedures to resolve questions of admissibility of classified information in advance of its use in open court.” *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1325 (D.N.W. 2000)
 - (i) The court may hold *ex parte*, *in camera* hearings with the prosecution. *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (“The district court reviewed the United States’s proposed substitutions, and concluded that they fairly stated the relevant elements of the classified documents. The substitutions were then disclosed to Rezaq’s attorney”).
 - (ii) The court also may hold *ex parte*, *in camera* hearings with the defendant. *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006) (“Although the government disputed the sufficiency of Defendant’s notice, the Court need not address this issue because it has held multiple hearings – including *ex parte*, *in camera* hearings with Defendant – providing Defendant with the opportunity to explain what classified information he seeks to disclose and how such information pertains to his case”).

(g) “Classified Information” defined.

- (i) “The fundamental purpose of CIPA is to protect and restrict the discovery of classified information in a way that does not impair the defendant’s right to a fair trial . . . ‘Classified information’ is ‘any information or material that has been determined by the United States Government pursuant to Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)). The term ‘national security’ is defined in Section 1(b) of the Act as ‘the national defense and foreign relations of the United States.’” *United States v. Scarfo*, 180 F. Supp. 2d 572, 579-80 (D.N.J. 2001).
- (ii) “Classified information is defined as including ‘information and material’ subject to classification or otherwise requiring protection from public disclosure. *See* 18 U.S.C. app. III § 1. Thus, CIPA applies to classified testimony as well as to classified documents . . .” *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1326, n.1 (D. N.M. 2000). “The information consisted of classified testimony given during the suppression hearing in this case”). *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006).

Teaching Point: the term “classified information” is defined in CIPA; case law makes clear the definition includes testimony. *See United States v. Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (Israeli intelligence personnel testified in a closed courtroom, using pseudonyms, in pre-trial hearings under CIPA).

- (iii) During *ex parte*, *in camera* review of the evidence, the judge cannot exclude classified information that is **exculpatory**; exculpatory evidence, in accordance with the Constitution, as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963), must be provided to the defense. This includes, of course, *Giglio* information. After approving the trial

judge's CIPA rulings concerning *Brady*, the Seventh Circuit appellate court went on to approve the trial court's ruling in regard to *Giglio* saying: "The court also found that the government's proposed unclassified summary was sufficient so as not to deprive Dumeisi of any potential impeachment value that the information had under *Giglio v. United States*, 405 U.S. 150 (1972)." *United States v. Dumeisi*, 424 F.3d. 566, 577 (7th Cir. 2005)

Teaching Points: the students should be asked in class to explain why this is so. The answer: under *Brady/Giglio*, it is a matter of constitutionally required due process of law for the Government to provide defendants with exculpatory evidence in the possession of the Government.

- (iv) If the classified information is not exculpatory, then the judge will evaluate the relevancy of the information. In this regard, *case law* holds that if the classified information is not at least "helpful to the defendant," then the Constitution does not require that it be disclosed to the defendant.
- (v) If the classified information is not exculpatory *and* is helpful to the defendant, but "not essential" to the defense, *case law* holds that the judge *may* restrict discovery of this evidence by the defendant. In this regard, Federal Rule of Criminal Procedure 16(d)(1) permits the judge "for good cause, to deny, restrict or defer discovery or inspection." *United States v. Mejia*, 448 F. 3d 436, 457 (D.C. Cir. 2006).
 - a. "In order to determine whether the government must disclose classified information, the court must determine whether the information is 'relevant and helpful to the defense of an accused' . . . Under this test, information meets the standard for disclosure 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

have been different.”” *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998).

- b. A minority of courts will apply a *balancing* test to *relevant* classified evidence. That is, the court will balance the government’s national security needs against the defense’s need for classified information that is relevant under the FRE. “A district court may balance a defendant’s need for information against national security concerns when determining whether information is discoverable.” *United States v. Mohamed*, 410 F. Supp. 2d 913, 918 (S.D. Cal. 2005). The Fourth Circuit also will also balance in this fashion: “Not all relevant evidence is admissible at trial, however. Fed. R. Evid. 402. The government argues that even if the evidence in question is relevant it should be excluded under a privilege recognized by *Roviaro v. United States*, 353 U.S. 53 (1957) (other citations omitted). We believe that the district court committed an error of law in not applying such a privilege before ruling the relevant classified information admissible. *United States v. Smith*, 780 F.2d 1102, 1106-7, (4th Cir. 1985).

Teaching Points: the student’s do not need to know this but the instructor should. A minority of Circuits will exclude some relevant evidence on the grounds that the defendant’s need for it is counterbalanced by the Government’s need to protect the classified information. The majority of courts will not do this. *United States v. Cardoen*, 898 F. Supp. 1563, 1571 (S.D. Fla. 1995) (“Although the Eleventh Circuit has not addressed this issue, it has been addressed in the Southern District of Florida. In *United States v. Lopez-Lima* (citations omitted), the court, after analyzing Eleventh Circuit precedent that bears on the issue, declined to apply this additional balancing test . . . The Court finds [the trial judge’s] reasoning persuasive and similarly declines to adopt the additional Fourth Circuit balancing test in

determining the relevance and admissibility of classified information”).

- c. The weighing process can and does work against the defendant. “Upon a thorough review of the documents and consideration of Defendant’s need for the materials and confrontation rights, the Court finds national security concerns substantially outweigh Defendant’s need for the documents.” *United States v. Mohamed*, 410 F. Supp 2d. 913 (S.D. Cal. 2005).
- d. The weighing process can and does work against the prosecution. “. . . The district court, after an *in camera*, *ex parte* review of the documents and a review of the alternative substitution with deletions, ruled that the classified documents were material and discoverable under Rule 16, and that the proposed alternative substitutions with deletions was deficient and not acceptable . . . We have examined the materials submitted *in camera* and agree with the district court that they are relevant to the development of a possible defense . . . The government’s proposed summaries of the materials are inadequate. We find no abuse of discretion in ordering full disclosure.” *United States v. Clegg*, 740 F.2d 16, 17 (9th Cir. 1984).

Teaching Points: the CIPA system is meant to be fair. The defense can go too far in trying to introduce classified information and the Government can go too far in trying to protect it:

- (h) Some examples of how CIPA works.
 - (i) “In its preparation for trial, the Government conducted a comprehensive search of a number of federal agencies with intelligence and national security functions and found classified documents that contained potentially discoverable information. Pursuant to section 4 of CIPA, Rule 16(d)(1) of the Federal Rules of

Criminal Procedure and applicable case law, the Court authorized the Government to file an *ex parte, in camera* motion for a protective order regarding these classified. Subsequently, . . . the Government submitted documents containing more classified materials and requested that the Court make pretrial rulings limiting the defendant's access to classified documents it had come across in its review of the federal agencies. As a result of the showing the Government made for each of the three motions, the Court made the necessary findings regarding the classified nature of the information and the likely damage to the national security if the information were released and issued the sealed protective orders of [dates issued]. Each of the three protective orders authorized the Government to provide the defendant with an unclassified substitute, thereby satisfying its discovery obligations. In addition, [two of the] Orders concluded that some of the classified information was non-discoverable and need not be summarized in unclassified form for the defendant." *United States v. Ressaam* 211 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002)

Teaching Points: During the pretrial discovery process, under FRE 16, the government found documents that may be responsive to the defendants' discovery motions. This information was first filtered through the judge, *ex parte* and *in camera*, where the judge made appropriate rulings allowing substitutions in some instances and, in others, ruling pretrial that some of the classified information that the Government thought may be responsive to the defendant's discovery request was non-discoverable.

- (ii) "... as a result of [date] in camera, ex parte hearing, the Court is now satisfied that the KLS [Key Logging System] was in fact classified as defined by CIPA. The Court also concludes that under Section 4 and 6(c) of CIPA the government met its burden in showing that the information sought by the Defendants constitutes classified information touching upon national security concerns as defined in CIPA. Moreover, it is the opinion of the Court that as a result of the

[date] hearing, the government presented to the Court's satisfaction proof that disclosure of the classified KLS information would cause identifiable damage to the national security of the United States. The Court is precluded from discussing this information in detail since it remains classified." *United States v. Scarfo*, 180 F. Supp. 2d 572, 580-81 (D.N.J. 2001).

"Further, upon comparing the specific classified information sought and the government's proposed unclassified summary, the Court finds that the United States met its burden in showing that the summary in the form of the Murch Affidavit would provide Scarfo with substantially the same ability to make his defense as would disclosure of the specific classified information regarding the KSL technique. The Murch Affidavit explains, to a reasonable and sufficient degree of specificity without disclosing the highly sensitive and classified information, the operating features of the KLS. The Murch Affidavit is more than sufficient and has provided ample information for the Defendants to litigate this motion. Therefore, no further discovery with regard to the KLS technique is necessary." *Id.* at 581.

Teaching Points: this is a criminal case against local mob characters; the FBI used a KLS to identify the keystrokes that encrypted the illegal gambling racket's entries. With the keystrokes identified, the government was able to defeat their encryption system and decode the entries for presentation as evidence. In this case, after some hesitation, the judge found the KLS to be properly classified. Under CIPA proceedings, the government was able to keep the exact details of the KLS's working system from being disclosed to the defense; however, an acceptable substitution had to be provided so that the defendants would be able to challenge the government's method of breaking Scarfo's computer's encryption system.

- (iii) "The government has already produced 250 tape recorded conversations, which have been declassified and which constitute the

bulk of the information that the government intends to introduce in its case in chief. It intends to produce tapes of approximately 100 additional declassified conversations. However, the government has indicated that much of the remaining discoverable material required to be turned over in this case constitutes 'classified information' . . . The government has agreed to produce approximately 7000 reels of audio tapes of conversations . . . These documents and tapes must be produced to the defendants . . . to allow defendants . . . to review the materials . . . in preparation for trial." *United States v. Musa* 833 F. Supp. 752, 753 (E.D. Mo. 1993).

"Here the defendants have simply argued that any restriction on their use or dissemination of materials produced to them in discovery is unconstitutional. They have provided no basis for this argument. Rule 16(d) Fed. R. Crim. P., gives the Court broad discretion to regulate discovery in criminal cases. In this case the defendants are being provided with these tapes and logs, and the government is not attempting to avoid producing any of these materials by reason of their classification status. The CIPA protective order provisions do not restrict defendants' fifth or sixth amendment rights, and the right to a public trial is not infringed by the protective order sought here, which simply prohibits unnecessary disclosure of classified information provided to the defendant in discovery. A later determination will be made, if necessary, regarding the use of classified information at trial. Defendant's general objections to the issuance of a protective order will be overruled." *Id.* at 754.

Teaching Points: this is a spin-off case from the *Isa* case; the defendants are Abu Nidal terrorists who, of course, had no access to classified information. Nonetheless, discovery under FRE 16 will get defendants lots of classified information when the government must use classified information in its case in chief. When this occurs, a protective order is issued to prevent misuse of the classified information by the defense.

2.

(b)(7)(E)

(d) This works because of *Scher v. United States*, 305 U.S. 251 (1938) which holds that the source of the LEA agent's information is not important. The legality of the agent's actions depends not on what the agent was told but on what the agent saw or overheard when he investigated.

(e)

(b)(7)(E)

3. Non Responsive

Non Responsive

4. A special technique using Federal Rule of Criminal Procedure (FRCP)16(d)(1) and CIPA.
 - (a) FRCP 16(d)(1) permits the court to deny discovery sought by a defendant. CIPA allows the Government to present classified information to the court *ex parte, in camera* for a decision whether the evidence is subject to discovery. In accordance with Section 4 of CIPA, the Government may ask the court to grant an *ex parte, in camera* proceeding concerning classified

information at which the Government will attempt to persuade the court that the classified information is not discoverable in accordance with FRCP 16(d)(1). Two cases uphold using the combination of these statutory rules to file *ex parte*, *in camera* proceedings in cases in which neither the prosecution team nor the defense team are aware of classified information related to the defendant that is the possession of the Government. *United States v. Innamorati*, 996 F.2d 456, 487-88 (1st Cir. 1993) and *United States v. Mejiia*, 488 F.3d 436, 453-459 (D.C. Cir. 2006).

- (b) In this circumstance, that is, where neither the prosecution team (including investigators and assistants) nor the defense team (including investigators and assistants) is aware of the classified information related to the defendant, a special team of prosecutors, referred to as the ***Taint Review Team***, handles the CIPA litigation concerning the classified information. (A Taint Review Team is used only in such extraordinary circumstances, which so far, involved only drug law prosecutions. Normally, the prosecution team is well aware of the classified information related to the case it is prosecuting; therefore, normally, the prosecution team handles the CIPA proceedings).
- (c) The trial judge must make a decision that the classified information, *even though it relates to the defendant*, is not discoverable. In order to be non-discoverable, the information must not be *Brady/Giglio* information and it further must not be “at least helpful” to the defendant. *United States v. Meiji*, 488 F.3d at 458. If the trial judge concludes that the classified information is not at least helpful to the defendant, the judge will issue a protective order and seal all the related classified material.
- (d) If the defendant is convicted, the sealed material will be forwarded to the appellate court. This procedure is discussed in detail in *Meiji*. On appeal in *Meiji*, the appellate court notified counsel for the prosecution and the defense of the *ex parte* information in the court’s possession and asked for briefs from both sides relevant to this circumstance. However, at this stage of the appellate review, neither the prosecution team nor defense team were provided with the classified information involved in the proceedings.

- (e) The *Meiji* appellate court ruled that the classified material was not discoverable and that the briefs submitted by the prosecution team and the defense team were not persuasive concerning their entitlement to review the classified materials.

C. CONCLUSION.

While not the normal course of business, highly classified IC information is being used to assist LEAs in their investigative activities. This class has outline four techniques involving CIPA, (b)(7)(E) FISA and a combination of FRCP 16(d)(1) and CIPA that permit this interaction. Case law supports each of these undertakings. For example, (b)(7)(E) is based on Supreme Court law dating back to 1938.

In order for these techniques to work properly the Government must ensure that there is a level playing field between the prosecution and the defense at all times. The Government keeps close records of the use of these techniques to ensure that it can be proved to judges and/or oversight personnel from Congress or the administration that the defendant is was not unlawfully or unconstitutionally disadvantaged by these techniques.

CASES AND SELECTED BIBLIOGRAPHY

1. Ronald J. Sievert, War on Terrorism or Global Law Enforcement Operation?, 78 Notre Dame L. Rev. 307 (January 2003).
2. Newspaper article: The Big Difference Between Intelligence and Evidence, by Bruce Berkowitz.
3. Jonathan M. Fredman, Intelligence Agencies, Law Enforcement, and the Prosecution Team, 16 Yale L. & Pol'y Rev. 331 (1998).
4. *Brady v. Maryland*, 373 U.S. 83 (1963).
5. *Giglio v. United States*, 405 U.S. 150 (1972).
6. *Jencks v. United States*, 353 U.S. 657 (1957).
7. *Roviaro v. United States*, 353 U.S. 53 (1957).
8. *Scher v. United States*, 305 U.S. 251 (1938).
9. *United States v. Cardoen*, 898 F. Supp. 1563 (S.D. Fla. 1995).
10. *United States v. Clegg*, 740 F.2d 16 (9th Cir. 1984).
11. *United States v. Dumeisi*, 424 F.3d 566 (7th Cir. 2005).
12. *United States v. Frenandez*, 913 F.2d 148 (4th Cir. 1990).
13. *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004).
14. *United States v. Innamorati*, 996 F.2d 456 (1st Cir. 1993).
15. *United States v. Isa*, 923 F.2d 1300 (8th Cir. 1991).
16. *United States v. Klimavicius-Viloria*, 144 F.3d 1249 (9th Cir. 1998).
17. *United States v. Lopez-Lima*, 738 F. Supp. 1401 (S.D. Fla. 1990).
18. *United States v. Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006).
19. *United States v. Mejia*, 488 F.3d 436, 453-459 (D.C. Cir. 2006).
20. *United States v. Mohamed*, 410 F. Supp. 2d 913 (S.D. Cal. 2005).
21. *United States v. Musa* 833 F. Supp. 752 (E.D. Mo. 1993).
22. *United States v. Pappas*, 94 F.3d 795 (2nd Cir. 1996).
23. *United States v. Ressam* 211 F. Supp. 2d 1252 (W.D. Wash. 2002).
24. *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998).
25. *United States v. Salah*, 462 F. Supp. 2d 915 (N.D. Ill 2006).
26. *United States v. Scarfo* 180 F. Supp. 2d 572, 580-81 (D.N.J. 2001).
27. *United States v. Smith*, 780 F.2d 1102 (4th Cir. 1985).
28. *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000).
29. *United States v. Wilson*, 571 F. Supp. 1422 (S.D.N.Y. 1983).

Handling Sensitive Information

Legal Instruction Objectives

1. Your classes on the Federal Rules of Evidence (FRE), the Federal Rules of Criminal Procedure (FRCP) and Intelligence Community/Law Enforcement Authorities are applicable to this class. I suggest that you review your workbooks, notes and especially the quizzes related to these classes.
2. Articulate that the Constitution, statutory authority and case law provide defendants in a criminal case many rights including: open and public trial proceedings, knowledge of the charges against; a right to obtain and call witnesses; a right to obtain evidence and present documentary evidence; representation by counsel; a right to confront witnesses and evidence presented against the defendant.
3. At the end of this block of instruction the student will be able to do the following on a written test without error:
 - a. Identify the four methods discussed in this class of combining Intelligence Community (IC) information with law enforcement agency (LEA) information for the benefit of LEA investigations.
 - b. Articulate that IC information is normally classified but that authority exists to de-classify IC information for many purposes, including use in criminal trials where this is necessary.
 - c. Articulate that the FRE and the FRCP contain enough flexibility to permit a trial judge to limit or restrict discovery in criminal cases.

- e. Method #2: Use CIPA. Articulate that the Classified Information Procedures Act (CIPA) protects IC sources and methods. Identify CIPA's limitations in this regard (use the outline below).
 - i. Identify how the following terms or concepts work in CIPA proceedings.
 - (1) *Ex parte* and *in camera* hearings.
 - (2) Exculpatory evidence.
 - (3) Judge-ordered disclosure/non-disclosure of classified information.
 - a. Information that is “relevant **and** material” to the defendant’s defense (or to the strategy of the defense).
 - b. Authorized *redaction* of records.
 - c. Authorized *substitution* for information in records: for example, putting some of the information found in a classified cable into a different format: a plain bond piece of paper).

- ii. Identify how the following terms or concepts are used to balance the government's right to protect classified information.
 - (1) Articulate that the government *does* have a right and duty to protect classified information.
 - (2) Articulate that in a CIPA proceeding in which IC collected information (classified information) is relevant, the judge must decide what classified information (of all of it that is relevant) is *material* to the defense so that the defendant may fairly present a defense to the charges (that is, the judge must understand the defense counsel's strategy or theory of the defense in order to make these decisions).
 - (3) Articulate that the trial judge may decide that classified information that is not needed by the defendant to support the defense strategy is either irrelevant or relevant but inadmissible (that is, the judge decides that it is not *material* to the defense strategy) in accordance with FRE 401-403.
 - (4) Articulate that FRE "relevance" concepts used in conjunction with FRCP 16(d)(1) (Regulating Discovery—Protective and Modifying Orders) permit a trial judge to limit a defendant's ability to obtain discovery of IC collected information (or for that matter, discovery of information in general).

- (5) Describe why the government might decide to drop certain charges or all charges against a defendant when it receives adverse decisions from a judge during CIPA proceedings.

Non Responsive

- g. Method #4: Use Parallel Construction. Articulate that the concept known as “parallel construction” can shield information that might otherwise be discoverable in circumstances where the IC and LEAs have focused on the same individual or groups of individuals (use the outline below).
 - i. Articulate that the concept of parallel construction can protect IC collection efforts that are related to or are being conducted against persons an LEA is investigating.
 - ii. Identify what the Taint Review Team does, how it does it and why the Taint Review Team must do what it does.
 - iii. Articulate that FRE “relevance” concepts used in conjunction with FRCP 16(d)(1) (Regulating Discovery—Protective and Modifying Orders) permit a trial judge to limit a defendant’s ability to obtain discovery of IC collected information (or for that matter, discovery of information in general).

UNITED STATES
DEPARTMENT OF JUSTICE

Drug Enforcement Administration



LESSON PLAN

Handling Sensitive Information



Handling Sensitive Source Information: A Level Playing Field

(b)(6) Senior Attorney
Legal Instruction Section (CCT)

1

Differing Goals

- Law Enforcement:

- investigate and prosecute violations of U.S. law;
- transparency = expectation is that everything will eventually see the light of day, including sources.

2

Differing Goals

- Intelligence Community:

- collect information for policy makers;
- clandestine or covert;
- *not* transparent = statutory obligation to protect sources and methods.

3

Outline

- Rules of Discovery
- Classified Information Procedures Act
- Managing Discovery Risks

(b)(7)(E)

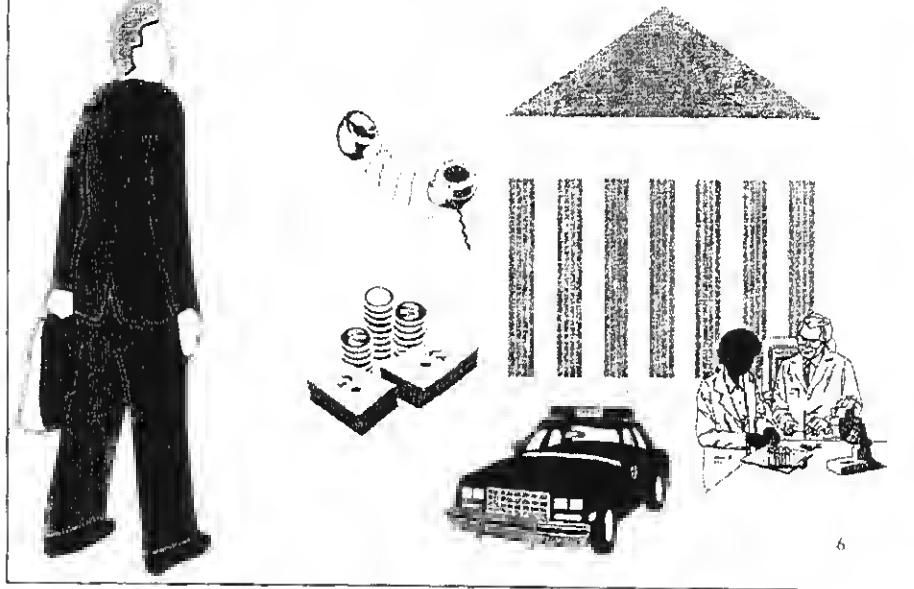
Discovery

- Defendant's access to information.
- Level playing field.



5

Level Playing Field



Types of Information that may be Discoverable:

- Anything used at trial (FRCP 16);
- Recorded statements of the defendant (FRCP 16);
- Results of tests - medical, scientific, etc. (FRCP 16);

7

Types of Information that may be Discoverable:

- Exculpatory information (Brady);
- Impeachment of witnesses (Giglio);
- Statements of witnesses (Jencks);

8

Types of Information that may be Discoverable:

- Illegally obtained evidence (18 U.S.C. § 3504) (especially electronic surveillance);
- Authentication (chain of custody);
- Affidavits.

9

Real Life Case Situations

- Think of the following case situations in terms of a prosecution in the United States.
- Using the Discovery rules outlined in the last few slides, see if you can discover any problems the prosecution may encounter.

10

Real Life Case Situation

- FYI.
- Discovery rules apply to materials and/or information in the hands of the **United States Government**.

13

Real Life Case Situation

- What problems:
 - If this wire is running in our country?
 - If this wire is running in a foreign country?
 - By a foreign LEA,
 - By a foreign IC entity,
 - Without a lawful authority.

14

Real Life Case Situation

- If not, other solutions include
 - drop employee as witness
 - seek disclosure of wire
 - oppose discovery in court.....

16

“Relevant and material”

- Keep in mind that only that which is relevant and material to the defense must be disclosed. How can relevancy be determined?

CIPA

17

What is CIPA?

- Classified Information Procedures Act.
- Permits *pre-trial, ex-parte, in camera* review of classified information to determine relevancy.

18

What's Our Argument?

- Judge, the information is not exculpatory to the defendant.
- And, otherwise, the interests of national security outweigh the relevance of the information to the defendant.

19

Taint Review Team

(b)(7)(E)

- The team looks for discoverable information.
- This review team will handle the CIPA litigation and related discovery issues.

20



CIPA

- Judge may issue a protective order:
 - protecting the information from disclosure during the discovery process, and
 - precluding the defense from exploring those issues at trial.

21



CIPA

- Judge may determine that the playing field is not level in which case the options are:
 - disclose a redacted version;
 - substitute a summary;
 - stipulate to the fact.

22



If all else fails....

- Judge may order full disclosure of the information. In that case, we can
 - disclose the information (but remember Third Party Rule)
 - OR, ...

23



If all else fails....

- structure the indictment around the information
 - change time, charges, witness
- or dismiss the case (has happened only once).

24

See No Evil

- Other agency information is relevant to our discovery obligations if we know or have reason to know the information exists.
- Minimize the risk of exposure of that information if we don't know of it.

25



Why does this work?

- Scher v. US, 305 U.S. 251 (1938). A prohibition agent receives information, sets up surveillance, and sees defendant handling whiskey.
- At trial, the defense attorney asks the agent how he came to be watching the defendant.

34



The court held . . .

- The source of the information which caused the defendant to be observed is unimportant.
- *And . . .*

35



The Court held . . .

- *The legality of the agent's action did not depend on something told to the agent . . .*
- *But did depend on what the agent saw (heard) when he investigated.*

36

OBJECTIVES

I. INSTRUCTIONAL GOAL:

The most perplexing problem in combining the collection capabilities of the Intelligence Community (IC) with the enforcement objectives of Law Enforcement Agencies (LEAs) is using IC information in LEA investigations. This block of instruction will introduce students to legally acceptable methodologies for handling this problem.

II. INSTRUCTIONAL OBJECTIVES:

Based on the criteria presented in this block of instruction, the students will be able to identify the primary methodology for protecting IC information that is shared with LEAs, that is, the tips and leads paradigm known as (b)(7)(E). In addition, the students will be able to identify two statutes that enable sharing of such information in the courtroom and other recent legislative enhancements for this purpose.

ITEMS AND MATERIALS

- A. ARTICLES: None.
- B. AUDIOVISUAL AIDS: PowerPoint presentation; Overhead Projector, Screen.
- C. HANDOUT MATERIALS: A list of cases broken down by issues raised in litigation.
- D. OTHER: Students will be offered an opportunity to select articles from a list maintained by the instructor that provide more detailed information on subjects addressed in this block of instruction. The instructor will photocopy and distribute the articles to those requesting them.

INSTRUCTOR MANUSCRIPT

Handling Sensitive Information

A. INTRODUCTION.

1. SELF-INTRODUCTION: I am (b)(6) of the Legal Instruction Section, DEA Academy.
2. ATTENTION-GETTER/"GRABBER": The defendant is a Central Intelligence Agency (CIA) case officer who worked in counter-terrorism operations against Osama bin Laden and the al Qaeda. He is on trial for passing CIA secrets, without authority, to a "friendly" foreign government. The defendant case officer claims that classified cables and other records in the CIA will help him prove he was authorized to share the information or at least will help him raise a reasonable doubt about the prosecution's allegation that he was not authorized to share this information. In the alternative, the defendant claims that CIA operating procedures outlined in manuals and other documents, all of which are highly classified, would demonstrate that even if he had no explicit authority to release the information he shared, established counter-terrorism operating procedures authorized him to do so. The defendant asks the trial judge to order the CIA to turn over to the defense the relevant cables, records and operating manuals. Does he get them?
3. NEEDS STATEMENT: This class introduces intelligence analysts to the use of IC information in law enforcement investigations.
4. THESIS STATEMENT: The IC does not routinely work to help LEAs make their cases. The reason for this is that the sources and methods of IC information must be protected from disclosure for practical reasons and by law. Nonetheless, in many areas (counterterrorism and counterespionage come to mind), the IC and LEAs work together for the common objective of prosecuting wrongdoers. Our government has worked out a procedure commonly referred to as (b)(7)(E) to accommodate the sharing of IC information with LEAs. In addition, there are several statutes that facilitate this sharing of IC information with LEAs. Intelligence analysts need to be familiar with the workings of these procedures and statutes.
5. PREVIEW. This one or two-hour presentation will introduce the students to the basic procedures for using IC information in prosecutions while at the same time protecting its sources and methods from disclosure in court.

B. BODY.

1. **General.** Introduce the procedure known as (b)(7)(E). Remind them of (or depending on the knowledge of the audience, introduce them to) the Classified Information Procedures Act (CIPA), the Foreign Intelligence Surveillance Act (FISA) and recent amendments to law in the PATRIOT ACT of 2001 that facilitate information sharing between the IC and LEAs.

2. **Body.** Discuss the necessity and procedure for handling sensitive information.

a. The problem.

1. The IC and LEAs have different goals. The key difference is that LEAs expect the result of their work to be presented in open court, to be transparent. The IC hopes this never happens to the work they perform.
2. LEAS and rules of discovery (the IC's nemesis). Defendants are entitled to:
 - (a) Anything used at trial, Federal Rule of Criminal Procedure (FRCP) 16.
 - (b) Recorded statements of the defendant, FRCP 16.
 - (c) Results of tests – medical, scientific, etc., FRCP 16.
 - (d) Exculpatory information (Brady).
 - (e) Impeachment of witnesses (Giglio).
 - (f) Statements of witnesses (Jencks).
 - (g) Illegally obtained evidence (18 U.S.C. § 3504).
 - (h) Authentication (chain of custody).
 - (i) Affidavits.
3. What if some of this information is classified information in the hands of the IC?
 - (a) It does not matter; the defendant is entitled to it.
 - (b) Graymail = give up classified information or drop the case (or some of the charges).

b. Solutions to the problem.

1. The Classified Information Procedures Act (CIPA).
 - (a) Only relevant and material information is admissible. This is the first cut.
 - (b) If the classified information is admissible, CIPA permits pre-trial, *ex-parte, in camera* review of classified information before the defendant sees it.
 - (c) The judge can weigh the interests of national security against the relevance of the information to the defendant unless the information is exculpatory.
 - (d) The prosecutor's office sets up a taint review team. The prosecutor in the case does not see all the classified information; instead, the taint review team looks it over to separate out discoverable information.
 - (e) The review team, not the prosecutor, handles the CIPA hearing with the trial judge.
 - (f) The trial judge makes independent decisions about what portions of the

classified information, if any, is discoverable. He may issue an order:

- (1) Protecting the information from disclosure.
- (2) Precluding the defense from exploring issues at trial.
- (3) Requiring disclosure of the classified information.
- (4) Disclosing a redacted version of the classified information.
- (5) Substituting an unclassified summary of the classified information.
- (6) Approving a stipulation of fact.

2.

(b)(7)(E)

- (d) This works because of Scher v. United States, 305 U.S. 251 (1938) which holds that the source of the LEA agent's information is not important. The legality of the agent's actions depends not on what the agent was told but on what the agent saw or overheard when he investigated.

(e)

(b)(7)(E)

3.

Non Responsive

4.

The PATRIOT Act of 2001.

- (a) The PATRIOT Act enhances our country's ability to combat terrorism; however, its provisions extend beyond investigating acts of terrorism.
- (b) The three major areas of the PATRIOT Act that enhance sharing of IC and LEA information are:
 - (1) Grand jury.
 - (2) Title III.
 - (3) FISA.

C. CONCLUSION.

While not the normal course of business, highly classified IC information can and is being used to assist LEAs in their investigative activities. A process known as (b)(7)(E) supports this endeavor. Based on Supreme Court law dating back to 1938,

(b)(7)(E)

In addition, CIPA and FISA facilitate the sharing of classified IC information with LEAs for prosecutorial purposes in a manner that protects IC sources and methods. The PATRIOT Act of 2001 enhanced our capability to share information between the IC and LEAs in three areas: grand jury, Title III and FISA.

LESSON PLAN
UPDATE and RE-CERTIFICATION 2009

Office of Chief Counsel
CCT

Lesson Plan Number: **LIS 080**
Lesson Plan Title: **Handling Sensitive Information**

This lesson plan accurately reflects both the content and methods of instruction, and contains test questions as well as copies of all visual aids and/or handout material used in the presentation of this class. I certify that:

- ☒ This lesson plan accurately reflects the contents of this course and has not changed since its last update.
- ☐ This is a revised lesson plan, and all revisions or updates to this previously approved lesson plan have been typed in **bold print**.
- ☐ All test questions associated with this lesson plan have been reviewed for accuracy and are consistent with the content and goals of this block of instruction.
- ☐ Electronic Media contained on CD.

(b)(6)

4/26/10

Instructor's Signature & Date

(b)(6)

5-13-10

& Date

(b)(6)

6/7/10

Deputy Chief Counsel Signature & Date

(b)(6)

8/13/10

LESSON PLAN UPDATE and RE-CERTIFICATION 2008

Lesson Plan Number: **LIS 080**
Lesson Plan Title: **Handling Sensitive Information**

This lesson plan accurately reflects both the content and methods of instruction, and contains test questions as well as copies of all visual aids and/or handout material used in the presentation of this class. I certify that:

- ☐ This lesson plan accurately reflects the contents of this course and has not changed since its last update.
- ☒ This is a revised lesson plan, and all revisions or updates to this previously approved lesson plan have been typed in **bold print**.
- ☒ All test questions associated with this lesson plan have been reviewed for accuracy and are consistent with the content and goals of this block of instruction.
- ☐ Electronic Media contained on CD.

(b)(6)
6/20/08
5-22-08
(b)(6)
6/20/08
(b)(6)
5/6/09

Deputy Chief Counsel

Note: If a legal review is required, TRP will forward the lesson plan to the Legal Instruction Section for review as appropriate.



Drug Enforcement Administration Lesson Plan

Handling Sensitive Information

As Presented By:

Legal Instruction Unit

**Lesson Plan:
Quantico, Virginia**

United States Department of Justice
Drug Enforcement Administration
Office of Training
Quantico, Virginia 22135

LESSON PLAN FACE SHEET
Office of Chief Counsel
CCT

TITLE OF INSTRUCTION: Handling Sensitive Information

TIME ALLOTTED: 2 hours

TARGET GROUP: Basic Intelligence Research Specialist
(BIRS) course

METHOD OF INSTRUCTION: Lecture, Discussion, PowerPoint
presentation and Handouts

DATE: April 27, 2010

Approvals:

Each approver will sign and date

INSTRUCTOR:

(b)(6)

Typed Name

Date

ASSOCIATE CHIEF COUNSEL

(b)(6)

Typed Name

Date

ASSISTANT DEPUTY CHIEF COUNSEL
OR DEPUTY CHIEF COUNSEL:

(b)(6)

Typed Name

Date

ASSOCIATE CHIEF COUNSEL CCT:

(b)(6)

Typed Name

Date

PLANNING & EVALUATION CHIEF:

(b)(6)

Typed Name

Date

Fair Use Statement

*Copyrighted materials contained in this lesson plan are strictly utilized for
educational purposes only as covered by Section 107 of Title 17 of the U.S. Code.*

Handling Sensitive Information

For Basic Intelligence Research Specialist Course No. 65

Legal Training Section
DEA Training Academy
Quantico, Virginia

4

workable methods of combining
IC & LEA information
for LEA benefit in trials.

What is *the problem* with
combining IC collection
efforts & LEA
investigations in US
courtrooms?

Some answers to this
question:

Constitutionally protected liberty
interests.

Discovery and due process of law
expressed in the FRCP & FRE.

And, Americans don't like it!

Overview, review

**The Constitution is the
supreme law of the
land.**

Overview, review

**Judges control our
courtrooms & they
have discretion.**

Overview, review

**The FRCP & FRE apply
to all prosecutions.**

Overview, review

The “Discovery” process in criminal trials is a duty imposed by the Constitution, statutes and case law.

Overview, review

Concepts of relevancy and materiality manage the introduction of evidence in criminal trials; judges have discretion in applying these concepts.

Discoverable Information:

= impeachment of witnesses [*Giglio*];

= Defendant's statements [FRCP 16];

= Other witness' statements [*Jencks*].

Discoverable Information:

= anything used at trial [FRCP 16];

= exculpatory information [*Brady*];

“Relevant Evidence”

FRE 401 “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

“Material evidence”

**Materiality = “any fact that is of
consequence to the determination
of the action”**

Also defined as . . .

“A reasonable man would attach
importance . . .”

“Information is material if it is
necessary to a determination”
of an issue.

Materiality

“Materiality” is relevance + ...

that is, materiality adds additional
meaning to “a fact with any
tendency . . .”

FRE 402 = Relevant Evidence
Generally Admissible; Irrelevant
Evidence Inadmissible.

FRE 403 = Exclusion of Relevant
Evidence on Grounds of
Prejudice, Confusion, or Waste of
Time

“Relevant *and* material evidence”

Only evidence that is *relevant and material* to the defense must be disclosed to the defendant.

FRE 401- 403 and FRCP 16(d)(1)

FRCP 16(d)(1)

The judge has *discretion* to:

Deny, restrict, or defer *discovery*

This normally occurs pre-trial and can occur *ex parte* and *in camera* . . .

**4 methods Americans
will accept (*so far . . .*)
to combine IC & LEA
collection efforts *and*
trial of the defendant**

(b)(7)(E)

(b)(7)(E)

Why does this work?

Scher v. US, 305 U.S. 251 (1938). A prohibition agent receives a "tip," commences a surveillance and, as a result, sees defendant handling whiskey.

The court held that the source of the tip which caused the defendant to be observed is *unimportant*.

And...

*The legality of the agent's actions did not
depend on something told to the agent*

*But did depend on what the agent
saw (heard) when he investigated.*

(b)(7)(E)

Method #2

Use CIPA.

“CIPA was designed to establish procedures to harmonize a defendant’s right to obtain and present exculpatory material upon his trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d. 795 (2nd Cir. 1996).

Method #2

CIPA permits pre-trial, *ex parte*,
in camera review of classified
information to determine
relevancy.

Method #2

If classified information must be
part of the Gov. case, we use
CIPA to limit the damage to
S&M interests.

Method #2

If a defendant introduces classified
information into the case, the
defendant must notify the judge
and request a CIPA hearing.

Method #2

In accordance with CIPA, the defendant must proceed in this manner or the classified information the defendant wishes to introduce can be excluded.

Method #2

CIPA helps to limit S&M damage, but it must allow *Brady* material and anything the judge, in the judge's discretion, says is discoverable by the defendant.

Method #4

Use Parallel Construction.

(b)(7)(E)

Method #4

We accomplish this by using a Taint Review Team.

(b)(7)(E)

(b)(7)(E)

“Relevant Evidence”

FRE 401 “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

FRE 402 – relevant evidence generally admissible . . . (meaning not all relevant evidence, including *classified* evidence, is admissible – we must convince the judge); evidence that is not relevant is not admissible.

FRE 403– “Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

FRCP 16(d)(1)—“At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party’s statement under seal.”

**LESSON PLAN
UPDATE and RECERTIFICATION 2012**

Lesson Plan Number: LIS 080

Lesson Plan Title: Handling Sensitive Information (BIRS)(FLEAT)

This lesson plan accurately reflects both the content and methods of instruction, and contains test questions as well as copies of all visual aids and/or handout material used in the presentation of this class. I certify that:

- ☐ This lesson plan accurately reflects the contents of this course and has not changed since its last update.
- ☒ This is a revised lesson plan, and all revisions or updates to this previously approved lesson plan have been typed in **bold print**.
- ☒ All test questions associated with this lesson plan have been reviewed for accuracy and are consistent with the content and goals of this block of instruction.
- ☐ Electronic File of this Lesson is included.

(b)(6)

5/7/12

(b)(6)

5-30-12

(b)(6)

6/19/12

Deputy Chief Counsel Signature & Date

(b)(6)

12/7/10

**United States Department of Justice
Drug Enforcement Administration
Office of Training
Quantico, Virginia 22135**

LESSON PLAN FACE SHEET

TITLE OF INSTRUCTION **Handling Sensitive Information**

TIME ALLOTTED: **2 Hours**

TARGET GROUP: **Basic Intelligence Research Specialists**

METHOD OF INSTRUCTION: **Lecture, Discussion**

DATE: *May 7, 2012*

Approvals:

Each approver will sign and date.

INSTRUCTOR:

(b)(6)

5/7/12
Date

ASSOCIATE CHIEF COUNSEL:

5-30-12
Date

**ASSISTANT DEPUTY CHIEF COUNSEL
OR DEPUTY CHIEF COUNSEL:**

6/19/12
Date

ASSOCIATE CHIEF COUNSEL CCT:

5-30-12
Date

PLANNING & EVALUATION CHIEF:

12/7/12
Date

Fair Use Statement:

*Copyrighted materials contained in this lesson plan are strictly utilized for
Educational purposes only as covered by Section 107 of Title 17 of the U.S. Code.*



Drug Enforcement Administration Lesson Plan

Handling Sensitive Information

As Presented By:

Legal Instruction Section

**Lesson Plan:
Quantico, Virginia**

SECTION I

OBJECTIVES

A. OVERALL SUBJECT OBJECTIVES:

Handling sensitive information. The main problem with combining the collection capabilities of the Intelligence Community (IC) (or other sensitive sources of information) with law enforcement investigations is the high potential for disclosure of these sensitive sources of information in our open, public trial system. This block of instruction will introduce students to legally acceptable methodologies for managing the problem of handling sensitive information.

B. LEGAL INSTRUCTION OBJECTIVES:

1. (b)(7)(E)

2. Articulate that the Classified Information Protection Act and the Foreign Intelligence Surveillance Act provide a means lawfully to limit the exposure of sensitive information during public trials.
3. Articulate that the concept known as “parallel construction” can be used to shield classified information that might otherwise be discoverable in a trial from the discovery process at trial by using the Classified Information Protection Act and a “Taint Review Team.”

ITEMS AND MATERIALS

- | | |
|-----------------------|---|
| A. ARTICLES: | None. |
| B. AUDIOVISUAL AIDS: | PowerPoint presentation; requires a computer, a projection device and a screen. |
| | An easel and butcher block paper. |
| C. HANDOUT MATERIALS: | Workbook for taking notes from PowerPoint slides. |
| D. OTHER: | A Take-Home/Turn-in Quiz. |

SECTION II

INSTRUCTOR MANUSCRIPT

Handling Sensitive Information

A. INTRODUCTION.

1. SELF-INTRODUCTION: I am (b)(6) of the Legal Instruction Section, DEA Academy.
2. ATTENTION-GETTER/"GRABBER": In previous classes we have discussed how the Intelligence Community (IC) and federal law enforcement agencies (LEAs) can work together. We have also discussed the *new*, post-9/11 national consensus concerning sharing information between federal agencies, including sharing information between the IC and LEAs for the purpose of prosecution. In this class we will discuss what happens when the new national consensus concerning information sharing meets the American constitutional and statutory requirements for an open and fair criminal trial.
3. NEEDS STATEMENT: This class introduces intelligence analysts to several tried and true ways that IC information may be used in law enforcement investigations and prosecutions.
4. THESIS STATEMENT: The IC does not routinely work to help LEAs make their cases. The reason for this is that the sources and methods that produce IC information must be protected from disclosure for practical reasons (to help ensure our intelligence activities are effective) and by law (federal statutes require the IC to protect its sources and methods). Nonetheless, in many areas (counterterrorism and counterespionage come to mind), the IC and LEAs work together with the understanding that one of their common objectives is to prosecute wrongdoers. Our government has worked out procedures to accommodate the sharing of IC information with LEAs for criminal investigations. Intelligence analysts need to be familiar with how these procedures and statutes work.

5. **PREVIEW.** This one or two-hour presentation will introduce the students to the fundamentals of using IC information for LEA investigations and prosecutions in a manner that protects IC sources and methods from disclosure in court.

B. BODY.

1. **General.** Introduce students to the procedure known as (b)(7)(E) remind them of (or depending on the knowledge of the audience, introduce them to) the Classified Information Procedures Act (CIPA) and the Foreign Intelligence Surveillance Act (FISA). Demonstrate to them four special techniques that allow some form of information sharing between the IC and LEAs when prosecution is their common objective.
2. **Body.** Discuss the basic problem in using IC information in LEA investigations and four solutions to this problem.
 - a. The problem.
 1. The IC and LEAs have different goals. The key difference is that LEAs expect the result of their work to be presented in open court, that is, LEAs expect the information they collect to be transparent because much of it will be introduced in court as part of the prosecution case against a defendant. The IC expects that the product of its work will not appear in court, that is, the IC's objective is for its work product is that it not be transparent.
 2. Rules of discovery in criminal cases in federal courts (the IC's nemesis). Defendants are entitled to:
 - (a) Anything used at trial, Federal Rule of Criminal Procedure (FRCP) 16.
 - (b) Oral, written or recorded statements of the defendant, FRCP 16.
 - (c) Results of tests – medical, scientific, etc., FRCP 16.
 - (d) Exculpatory information, *Brady v. Maryland*, 373 U.S. 83 (1963).

- (e) Impeachment of witnesses, *Giglio v. United States*, 405 U.S. 150 (1972).
 - (f) Statements of witnesses, *Jencks v. United States*, 353 U.S. 657 (1957).
 - (g) Illegally obtained evidence (18 U.S.C. § 3504).
 - (h) Authentication (chain of custody).
3. What are the consequences for trial if some of the above described information is classified information that is derived from IC collection efforts?
- (a) The defendant may be entitled to it no matter how highly classified it is; this fact has given rise to a concept known as *Graymail*.
 - (b) Graymail is the common term for a maneuver available to defendants who have access to classified information due to the nature of their employment (and are being prosecuted for criminal acts related to their employment) or who obtain access to classified information via pretrial discovery motions. In a graymail defense, the defendant forces the Government to either allow the classified information to be presented by the defense in open court or to drop the case (or the charges that are related to the classified information).
- b. Some solutions to the problem.
- 1. The Classified Information Procedures Act (CIPA).
 - (a) “CIPA was designed to establish procedures to harmonize a defendant’s right to obtain and present exculpatory material upon his trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d. 795 (2nd Cir. 1996).
 - (b) “CIPA was enacted in 1980 to combat the problem of ‘graymail,’ an attempt by a defendant to derail a criminal trial by threatening to disclose classified

information . . . (noting that [the] problem of graymail is not ‘limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same ‘disclose or dismiss’ dilemma” (citations to legislative history omitted). *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004).

- (c) CIPA does not create any new evidentiary rules; in fact, CIPA relies on the Federal Rules of Evidence (FRE) especially those governing relevancy.
- (d) Let’s review the FRE concerning *relevant evidence*.
 - (i) FRE 401 contains the definition of the term relevant evidence: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable that it would be without the evidence.
 - (ii) FRE 402 states that relevant evidence is generally admissible and irrelevant evidence is inadmissible.
 - (iii) FRE 403 permits the judge to exclude relevant evidence on grounds of prejudice, confusion or waste of time.

Teaching points: relevant evidence can be excluded; therefore, relevant *classified* evidence can be excluded.

- (iv) The *relevance* of classified information (that may or may not be evidence in accordance with the FRE) under CIPA is determined as if the information was not classified. “When determining the use, relevance and admissibility of the proposed evidence, the court may not take into account that the evidence is classified; relevance of classified information in a given case is governed solely by the standards set forth in the Federal Rules of Evidence.” *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1326, n.2 (D.N.M. 2000).

Teaching Points: the students should be asked to explain in class what the above quotation means in plain English. This is an important concept that must be understood by the students; it means that the fact that the information is classified is not enough in itself to resolve the issue of relevance or admissibility.

- (e) When evaluating classified information under FRE and CIPA, the court first focuses on FRE relevancy standards, then focuses on the type of relevant information that is useful to the *defense strategy*.
 - (i) “Under CIPA, the court must use existing standards for determining relevance and admissibility . . . The terms of this statute indicate that evidence may be excluded under F.R.E. 401 as irrelevant. Evidence may also be excluded under F.R.E. 403 as prejudicial, misleading, and confusing . . . The fact that the information in question is classified should not be considered when determining its admissibility . . . Lopez-Lima bears the burden of showing the admissibility of his section 5 information [of CIPA] . . .” *United States v. Lopez-Lima*, 738 F. Supp. 1404, 1407 (S.D. Fla. 1990).

Teaching Points: the defendant must notify the prosecution under section 5 of CIPA with some specificity of the classified information that the defendant intends to use in his defense (*see United States v. Badia*, 827 F.2d 1458, 1466 (11th Cir. 1987) (failure to comply without justifiable reason means the defendant cannot raise “matters at trial that should have been noticed pursuant to CIPA”). Nonetheless, the defendant still has the obligation of convincing the court that this information is admissible under the FRE.

- (ii) “If the court determines that classified information is admissible under section 6(a) [of CIPA], the government may move for permission to substitute a summary or admission of relevant facts under section 6(c)(1). The court must grant a section 6(c)(1) motion,

if it finds that the statement or summary will provide the defendant with ‘substantially the same ability to make his defense as would disclosure of the specific classified information.’ *Id.*, § 6(c)(1). If the section 6(c) motion is denied, the government can require the defendant not disclose the classified information. *Id.*, § 6(e)(1). Then, the court must dismiss the indictment, unless the government convinces the court that justice would not be served by the dismissal. *Id.*, § 6(c)(2).” *United States v. Lopez-Lima*, 738 F. Supp. at 1414.

Teaching Points: the government can protect admissible classified evidence with unclassified substitutions or admissions of fact. The court must be satisfied that they give the defendant “substantially the same ability” to make his defense as would the classified information itself.

- (iii) “For the reasons articulated, the court concludes that Lopez-Lima’s version of the events, if credited by the jury, establishes an affirmative defense to the aircraft piracy charge against him and negates the wrongful intent necessary to secure a conviction on that charge. The classified information Lopez-Lima seeks to introduce clearly is relevant to his defense, as it would tend to show that the CIA sanctioned the hijacking or that he reasonably believed that it did. Of course, while the classified information is relevant, it may not be persuasive before a jury . . . Notwithstanding, Lopez-Lima is entitled to have a jury consider the theories and evidence that he marshals in his defense . . . The court determines that Lopez-Lima is not precluded by F.R.E. 403 from introducing this classified information.” *United States v. Lopez-Lima*, 738 F. Supp. at 1414.

Teaching Points: if the classified information itself is relevant evidence, the government must produce it (this is the majority position; the minority position, discussed below, provides an additional balancing test at this point). The court makes this decision by focusing on the nature of the defendant’s defense. The

government also can punt, that is, the government can forgo the prosecution or the parts of it that are related to the classified information when the court finds that classified information is relevant and material to the defense. *United States v. Fernandez*, 913 F.2d 148, 164 (4th Cir. 1990) (“The district court acted within its discretion in determining that the government’s attempt to exclude evidence necessary to demonstrate this background [context of defendant’s allegedly false statements], as well as its effort to require the defendant to use abbreviated and lifeless substitutions for this crucial evidence, would have deprived Fernandez of any real chance to defend himself”).

- (f) For classified information that may be admissible, CIPA permits pre-trial, *ex parte*, *in camera* review of classified information to determine its admissibility. “CIPA creates a pretrial procedure for ruling upon the admissibility of classified information.” *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1260 (9th Cir. 1998); “The Classified Information Procedures Act . . . provides for pretrial procedures to resolve questions of admissibility of classified information in advance of its use in open court.” *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1325 (D.N.W. 2000)
 - (i) The court may hold *ex parte*, *in camera* hearings with the prosecution. *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (“The district court reviewed the United States’s proposed substitutions, and concluded that they fairly stated the relevant elements of the classified documents. The substitutions were then disclosed to Rezaq’s attorney”).
 - (ii) The court also may hold *ex parte*, *in camera* hearings with the defendant. *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006) (“Although the government disputed the sufficiency of Defendant’s notice, the Court need not address this issue because it has held multiple hearings – including *ex parte*, *in camera* hearings with Defendant – providing Defendant with the opportunity to

explain what classified information he seeks to disclose and how such information pertains to his case”).

(g) “Classified Information” defined.

- (i) “The fundamental purpose of CIPA is to protect and restrict the discovery of classified information in a way that does not impair the defendant’s right to a fair trial . . . ‘Classified information’ is ‘any information or material that has been determined by the United States Government pursuant to Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)). The term ‘national security’ is defined in Section 1(b) of the Act as ‘the national defense and foreign relations of the United States.’” *United States v. Scarfo*, 180 F. Supp. 2d 572, 579-80 (D.N.J. 2001).
- (ii) “Classified information is defined as including ‘information and material’ subject to classification or otherwise requiring protection from public disclosure. *See* 18 U.S.C. app. III § 1. Thus, CIPA applies to classified testimony as well as to classified documents . . .” *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1326, n.1 (D. N.M. 2000). “The information consisted of classified testimony given during the suppression hearing in this case”). *United States v. Salah*, 462 F. Supp. 2d 915, 916 (N.D. Ill. 2006).

Teaching Point: the term “classified information” is defined in CIPA; case law makes clear the definition includes testimony. *See United States v. Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (Israeli intelligence personnel testified in a closed courtroom, using pseudonyms, in pre-trial hearings under CIPA).

- (iii) During *ex parte*, *in camera* review of the evidence, the judge cannot exclude classified information that is *exculpatory*; exculpatory

evidence, in accordance with the Constitution, as interpreted in *Brady v. Maryland*, 373 U.S. 83 (1963), must be provided to the defense. This includes, of course, *Giglio* information. After approving the trial judge's CIPA rulings concerning *Brady*, the Seventh Circuit appellate court went on to approve the trial court's ruling in regard to *Giglio* saying: "The court also found that the government's proposed unclassified summary was sufficient so as not to deprive Dumeisi of any potential impeachment value that the information had under *Giglio v. United States*, 405 U.S. 150 (1972)." *United States v. Dumeisi*, 424 F.3d. 566, 577 (7th Cir. 2005)

Teaching Points: the students should be asked in class to explain why this is so. The answer: under *Brady/Giglio*, it is a matter of constitutionally required due process of law for the Government to provide defendants with exculpatory evidence in the possession of the Government.

- (iv) If the classified information is not exculpatory, then the judge will evaluate the relevancy of the information. In this regard, *case law* holds that if the classified information is not at least "helpful to the defendant," then the Constitution does not require that it be disclosed to the defendant.
- (v) If the classified information is not exculpatory *and* is helpful to the defendant, but "not essential" to the defense, *case law* holds that the judge *may* restrict discovery of this evidence by the defendant. In this regard, Federal Rule of Criminal Procedure 16(d)(1) permits the judge "for good cause, to deny, restrict or defer discovery or inspection." *United States v. Mejia*, 448 F. 3d 436, 457 (D.C. Cir. 2006).
 - a. "In order to determine whether the government must disclose classified information, the court must determine whether the information is 'relevant and helpful to the defense of an accused' . . . Under this test, information meets the standard for disclosure

‘only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’” *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998).

- b. A minority of courts will apply a *balancing* test to *relevant* classified evidence. That is, the court will balance the government’s national security needs against the defense’s need for classified information that is relevant under the FRE. “A district court may balance a defendant’s need for information against national security concerns when determining whether information is discoverable.” *United States v. Mohamed*, 410 F. Supp. 2d 913, 918 (S.D. Cal. 2005). The Fourth Circuit also will also balance in this fashion: “Not all relevant evidence is admissible at trial, however. Fed. R. Evid. 402. The government argues that even if the evidence in question is relevant it should be excluded under a privilege recognized by *Roviaro v. United States*, 353 U.S. 53 (1957) (other citations omitted). We believe that the district court committed an error of law in not applying such a privilege before ruling the relevant classified information admissible. *United States v. Smith*, 780 F.2d 1102, 1106-7, (4th Cir. 1985).

Teaching Points: the student’s do not need to know this but the instructor should. A minority of Circuits will exclude some relevant evidence on the grounds that the defendant’s need for it is counterbalanced by the Government’s need to protect the classified information. The majority of courts will not do this. *United States v. Cardoen*, 898 F. Supp. 1563, 1571 (S.D. Fla. 1995) (“Although the Eleventh Circuit has not addressed this issue, it has been addressed in the Southern District of Florida. In *United States v. Lopez-Lima* (citations omitted), the court, after analyzing Eleventh Circuit precedent that bears on the issue, declined to apply this additional balancing test . . . The Court

finds [the trial judge's] reasoning persuasive and similarly declines to adopt the additional Fourth Circuit balancing test in determining the relevance and admissibility of classified information").

- c. The weighing process can and does work against the defendant. "Upon a thorough review of the documents and consideration of Defendant's need for the materials and confrontation rights, the Court finds national security concerns substantially outweigh Defendant's need for the documents." *United States v. Mohamed*, 410 F. Supp 2d. 913 (S.D. Cal. 2005).
- d. The weighing process can and does work against the prosecution. ". . . The district court, after an *in camera*, *ex parte* review of the documents and a review of the alternative substitution with deletions, ruled that the classified documents were material and discoverable under Rule 16, and that the proposed alternative substitutions with deletions was deficient and not acceptable . . . We have examined the materials submitted *in camera* and agree with the district court that they are relevant to the development of a possible defense . . . The government's proposed summaries of the materials are inadequate. We find no abuse of discretion in ordering full disclosure." *United States v. Clegg*, 740 F.2d 16, 17 (9th Cir. 1984).

Teaching Points: the CIPA system is meant to be fair. The defense can go too far in trying to introduce classified information and the Government can go too far in trying to protect it.

(h) Some examples of how CIPA works.

- (i) "In its preparation for trial, the Government conducted a comprehensive search of a number of federal agencies with intelligence and national security functions and found classified

documents that contained potentially discoverable information. Pursuant to section 4 of CIPA, Rule 16(d)(1) of the Federal Rules of Criminal Procedure and applicable case law, the Court authorized the Government to file an *ex parte, in camera* motion for a protective order regarding these classified. Subsequently, . . . the Government submitted documents containing more classified materials and requested that the Court make pretrial rulings limiting the defendant's access to classified documents it had come across in its review of the federal agencies. As a result of the showing the Government made for each of the three motions, the Court made the necessary findings regarding the classified nature of the information and the likely damage to the national security if the information were released and issued the sealed protective orders of [dates issued]. Each of the three protective orders authorized the Government to provide the defendant with an unclassified substitute, thereby satisfying its discovery obligations. In addition, [two of the] Orders concluded that some of the classified information was non-discoverable and need not be summarized in unclassified form for the defendant." *United States v. Ressa* 211 F. Supp. 2d 1252, 1256 (W.D. Wash. 2002)

Teaching Points: During the pretrial discovery process, under FRE 16, the government found documents that may be responsive to the defendants' discovery motions. This information was first filtered through the judge, *ex parte* and *in camera*, where the judge made appropriate rulings allowing substitutions in some instances and, in others, ruling pretrial that some of the classified information that the Government thought may be responsive to the defendant's discovery request was non-discoverable.

- (ii) "... as a result of [date] in camera, ex parte hearing, the Court is now satisfied that the KLS [Key Logging System] was in fact classified as defined by CIPA. The Court also concludes that under Section 4 and 6(c) of CIPA the government met its burden in showing that the information sought by the Defendants constitutes classified

information touching upon national security concerns as defined in CIPA. Moreover, it is the opinion of the Court that as a result of the [date] hearing, the government presented to the Court's satisfaction proof that disclosure of the classified KLS information would cause identifiable damage to the national security of the United States. The Court is precluded from discussing this information in detail since it remains classified." *United States v. Scarfo*, 180 F. Supp. 2d 572, 580-81 (D.N.J. 2001).

"Further, upon comparing the specific classified information sought and the government's proposed unclassified summary, the Court finds that the United States met its burden in showing that the summary in the form of the Murch Affidavit would provide Scarfo with substantially the same ability to make his defense as would disclosure of the specific classified information regarding the KSL technique. The Murch Affidavit explains, to a reasonable and sufficient degree of specificity without disclosing the highly sensitive and classified information, the operating features of the KLS. The Murch Affidavit is more than sufficient and has provided ample information for the Defendants to litigate this motion. Therefore, no further discovery with regard to the KLS technique is necessary." *Id.* at 581.

Teaching Points: this is a criminal case against local mob characters; the FBI used a KLS to identify the keystrokes that encrypted the illegal gambling racket's entries. With the keystrokes identified, the government was able to defeat their encryption system and decode the entries for presentation as evidence. In this case, after some hesitation, the judge found the KLS to be properly classified. Under CIPA proceedings, the government was able to keep the exact details of the KLS's working system from being disclosed to the defense; however, an acceptable substitution had to be provided so that the defendants would be able to challenge the government's method of breaking Scarfo's computer's encryption system.

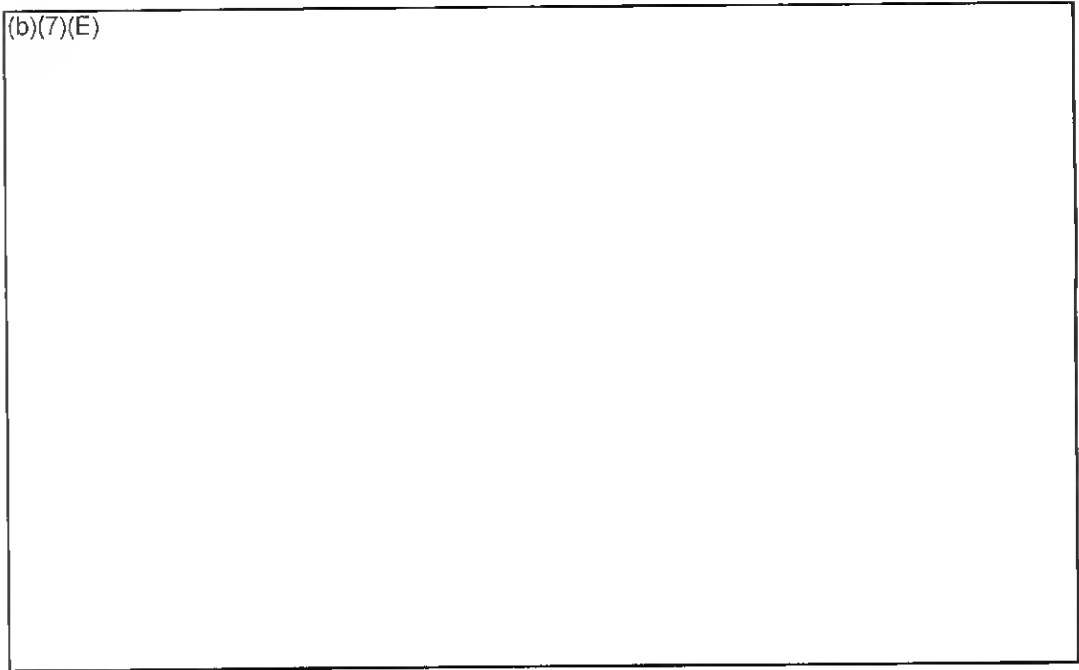
- (iii) “The government has already produced 250 tape recorded conversations, which have been declassified and which constitute the bulk of the information that the government intends to introduce in its case in chief. It intends to produce tapes of approximately 100 additional declassified conversations. However, the government has indicated that much of the remaining discoverable material required to be turned over in this case constitutes ‘classified information’ . . . The government has agreed to produce approximately 7000 reels of audio tapes of conversations . . . These documents and tapes must be produced to the defendants . . . to allow defendants . . . to review the materials . . . in preparation for trial.” *United States v. Musa* 833 F. Supp. 752, 753 (E.D. Mo. 1993).

“Here the defendants have simply argued that any restriction on their use or dissemination of materials produced to them in discovery is unconstitutional. They have provided no basis for this argument. Rule 16(d) Fed. R. Crim. P., gives the Court broad discretion to regulate discovery in criminal cases. In this case the defendants are being provided with these tapes and logs, and the government is not attempting to avoid producing any of these materials by reason of their classification status. The CIPA protective order provisions do not restrict defendants’ fifth or sixth amendment rights, and the right to a public trial is not infringed by the protective order sought here, which simply prohibits unnecessary disclosure of classified information provided to the defendant in discovery. A later determination will be made, if necessary, regarding the use of classified information at trial. Defendant’s general objections to the issuance of a protective order will be overruled.” *Id.* at 754.

Teaching Points: this is a spin-off case from the *Isa* case; the defendants are Abu Nidal terrorists who, of course, had no access to classified information. Nonetheless, discovery under FRE 16 will get defendants lots of classified information when the government must use classified information in its case in chief. When this occurs, a

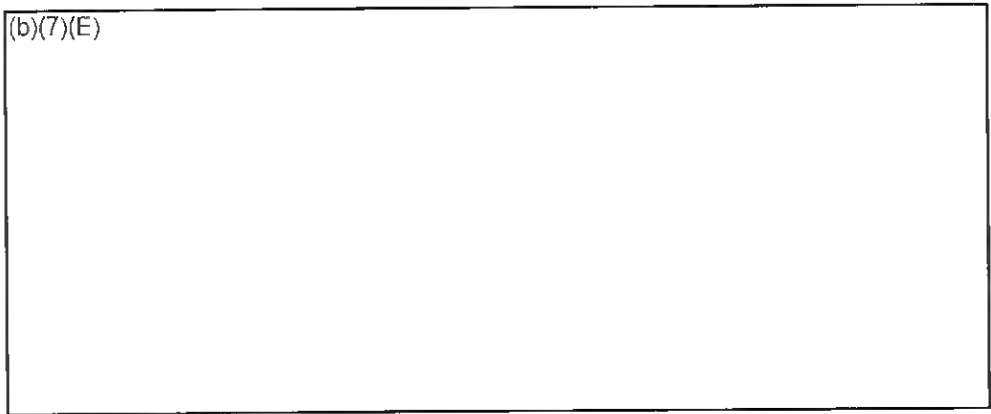
protective order is issued to prevent misuse of the classified information by the defense.

2. (b)(7)(E)



- (d) This works because of *Scher v. United States*, 305 U.S. 251 (1938) which holds that the source of the LEA agent's information is not important. The legality of the agent's actions depends not on what the agent was told but on what the agent saw or overheard when he investigated.

(e) (b)(7)(E)



4. A special technique using Federal Rule of Criminal Procedure (FRCP)16(d)(1) and CIPA.

- (a) FRCP 16(d)(1) permits the court to deny discovery sought by a defendant. CIPA allows the Government to present classified information to the court *ex parte, in camera* for a decision whether the evidence is subject to discovery. In accordance with Section 4 of CIPA, the Government may ask the court to grant an *ex parte, in camera* proceeding concerning classified information at which the Government will attempt to persuade the court that the classified information is not discoverable in accordance with FRCP 16(d)(1). Two cases uphold using the combination of these statutory rules to file *ex parte, in camera* proceedings in cases in which neither the prosecution team nor the defense team are aware of classified information related to the defendant that is the possession of the Government. *United States v. Innamorati*, 996 F.2d 456, 487-88 (1st Cir. 1993) and *United States v. Mejia*, 488 F.3d 436, 453-459 (D.C. Cir. 2006).
- (h) In this circumstance, that is, where neither the prosecution team (including investigators and assistants) nor the defense team (including investigators and assistants) is aware of the classified information related to the defendant, a special team of prosecutors, referred to as the *Taint Review Team*, handles the CIPA litigation concerning the classified information. (A Taint Review Team is used only in such extraordinary circumstances, which so far, involved only drug law prosecutions. Normally, the prosecution team is well aware of the classified information related to the case it is prosecuting; therefore, normally, the prosecution team handles the CIPA proceedings).
- (c) The trial judge must make a decision that the classified information, *even though it relates to the defendant*, is not discoverable. In order to be non-discoverable, the information must not be *Brady/Giglio* information and it further must not be “at least helpful” to the defendant. *United States v. Meiji*, 488 F.3d at 458. If the trial judge concludes that the classified information is not at least helpful to the defendant, the judge will issue a protective order and seal all the related classified material.

- (d) If the defendant is convicted, the sealed material will be forwarded to the appellate court. This procedure is discussed in detail in *Meiji*. On appeal in *Meiji*, the appellate court notified counsel for the prosecution and the defense of the *ex parte* information in the court's possession and asked for briefs from both sides relevant to this circumstance. However, at this stage of the appellate review, neither the prosecution team nor defense team were provided with the classified information involved in the proceedings.
- (e) The *Meiji* appellate court ruled that the classified material was not discoverable and that the briefs submitted by the prosecution team and the defense team were not persuasive concerning their entitlement to review the classified materials.

C. CONCLUSION.

While not the normal course of business, highly classified IC information is being used to assist LEAs in their investigative activities. This class has outline four techniques involving CIPA, (b)(7)(E) FISA and a combination of FRCP 16(d)(1) and CIPA that permit this interaction, **known as parallel construction.**

Case law supports each of these undertakings. For example, (b)(7)(E) is based on Supreme Court law dating back to 1938.

In order for these techniques to work properly the Government must ensure that there is a level playing field between the prosecution and the defense at all times. The Government keeps close records of the use of these techniques to ensure that it can be proved to judges and/or oversight personnel from Congress or the administration that the defendant is was not unlawfully or unconstitutionally disadvantaged by these techniques.

SELECTED BIBLIOGRAPHY

None.

Handling Sensitive Information

Basic Intelligence Research Specialist (BIRS) Courses

Legal Training Section
DEA Training Academy
Quantico, Virginia

Legal Instruction Objectives

At the end of this block of instruction the student will be able to do the following on a written test without error:

(b)(7)(E)

2. Articulate that the Classified Information Protection Act and the Foreign Intelligence Surveillance Act provide a means lawfully to limit the exposure of sensitive information during public trials.
3. Articulate that the concept known as “parallel construction” can be used to shield classified information that might otherwise be discoverable in a trial from the discovery process at trial by using the Classified Information Protection Act and a “Taint Review Team.”

4

workable methods of combining
IC & LEA information
for LEA benefit in trials.

What is *the problem* with
combining IC collection
efforts & LEA
investigations in US
courtrooms?

Some answers to this
question:

Constitutionally protected liberty
interests.

Discovery and due process of law
expressed in the FRCP & FRE.

And, Americans don't like it!

Overview, review

**The Constitution is the
supreme law of the
land.**

Overview, review

**Judges control our
courtrooms & they
have discretion.**

Overview, review

**The FRCP & FRE apply
to all prosecutions.**

Overview, review

The “Discovery” process in criminal trials is a duty imposed by the Constitution, statutes and case law.

Overview, review

Concepts of relevancy and materiality manage the introduction of evidence in criminal trials; judges have discretion in applying these concepts.

Discoverable Information:

- = impeachment of witnesses [*Giglio*];
- = Defendant's statements [FRCP 16];
- = Other witness' statements [*Jencks*].

Discoverable Information:

- = anything used at trial [FRCP 16];
- = exculpatory information [*Brady*];

"Relevant Evidence"

FRE 401 "... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

“Material evidence”

Materiality = “any fact that is of consequence to the determination of the action”

Also defined as . . .

“A reasonable man would attach importance . . .”

“Information is material if it is necessary to a determination” of an issue.

Materiality

“Materiality” is relevance + . . .

that is, materiality adds additional
meaning to “a fact with any
tendency . . .”

FRE 402 = Relevant Evidence
Generally Admissible; Irrelevant
Evidence Inadmissible.

FRE 403 = Exclusion of Relevant
Evidence on Grounds of
Prejudice, Confusion, or Waste of
Time

“Relevant *and* material evidence”

Only evidence that is *relevant and material* to the defense must be disclosed to the defendant.

FRE 401- 403 and FRCP 16(d)(1)

FRCP 16(d)(1)

The judge has *discretion* to:

Deny, restrict, or defer *discovery*

This normally occurs pre-trial and can occur *ex parte* and *in camera* . . .

**4 methods Americans
will accept (*so far . . .*)
to combine IC & LEA
collection efforts *and*
trial of the defendant**

(b)(7)(E)

(b)(7)(E)

Why does this work?

Scher v. US, 305 U.S. 251 (1938). A prohibition agent receives a "tip," commences a surveillance and, as a result, sees defendant handling whiskey.

The court held that the source of the tip which caused the defendant to be observed is *unimportant*.

And...

*The legality of the agent's actions did not
depend on something told to the agent*

*But did depend on what the agent
saw (heard) when he investigated.*

(b)(7)(E)

Method #2

Use CIPA.

“CIPA was designed to establish procedures to harmonize a defendant’s right to obtain and present exculpatory material upon his trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d. 795 (2nd Cir. 1996).

Method #2

CIPA permits pre-trial, *ex parte*,
in camera review of classified
information to determine
relevancy.

Method #2

If classified information must be
part of the Gov. case, we use
CIPA to limit the damage to
S&M interests.

Method #2

If a defendant introduces classified
information into the case, the
defendant must notify the judge
and request a CIPA hearing.

Method #2

In accordance with CIPA, the defendant must proceed in this manner or the classified information the defendant wishes to introduce can be excluded.

Method #2

CIPA helps to limit S&M damage, but it must allow *Brady* material and anything the judge, in the judge's discretion, says is discoverable by the defendant.

Method #4

Use Parallel Construction.

(b)(7)(E)

Method #4

We accomplish this by using a Taint Review Team.

(b)(7)(E)

(b)(7)(E)

“Relevant Evidence”

FRE 401 “... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

FRE 402 – relevant evidence generally admissible . . . (meaning not all relevant evidence, including *classified* evidence, is admissible – we must convince the judge); evidence that is not relevant is not admissible.

FRE 403– “Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

FRCP 16(d)(1)—“At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party’s statement under seal.”

Handling Sensitive Information

This is a place-holder slide.

4

***workable* methods of combining IC & LEA information for LEA benefit in trials.**

This class illustrates an aggressive use of law enforcement authorities. It employs aspects of your classes on Federal Rules of Evidence (FRE), Federal Rules of Criminal Procedure (FRCP) and *Brady/Giglio*.

In this class I will outline four methods of combining IC and LEA information for the benefit of LEAs at trial.

**What is *the problem* with
combining IC collection
efforts & LEA
investigations in US
courtrooms?**

This is a place-holder slide that asks the question presented for the students to answer.

Some answers to this question:

Constitutionally protected liberty interests.

Discovery and due process of law expressed in the FRCP & FRE.

And, Americans don't like it!

This slide gives some acceptable answers. The last answer, Americans do not like it, is a reminder that we in law enforcement work in fish bowl. That is, even though we seek to protect our citizens, generally, we can only use techniques to achieve that objective, which are acceptable to our citizens.

Overview, review

The Constitution is the supreme law of the land.

Now, let's take a quick review of law with which you are familiar from this course. This is our supreme law; we cannot violate it.

Overview, review

**Judges control our
courtrooms & they
have discretion.**

You will remember from both our FRE and FRCP classes that judges control what happens in the courtroom and that they have broad discretion.

Overview, review

The FRCP & FRE apply to all prosecutions.

These rules are law; in our prosecutions, where we are going to use IC information, these rules still apply. In this sense, there is nothing special about IC information.

The “Discovery” process in criminal trials is a duty imposed by the Constitution, statutes and case law.

That brings us to pre-trial discovery in criminal trials. You will recall that one of the reasons for pre-trial discovery is to make sure the defense has a good idea of the strength of the government’s evidence. As required by the Constitution, our statutes and case law, we cannot hide the ball from the defense in pre-trial discovery. Thus, if we are going to use IC information somehow, in accordance with these rules we will expose the existence of IC collection activities.

Overview, review

Concepts of relevancy and materiality manage the introduction of evidence in criminal trials; judges have discretion in applying these concepts.

This is a place-holder slide designed to alert the students that we will spend class time on relevancy and materiality, matters addressed in previous classes, as well as the fact of a trial judge's discretion in making decisions about relevancy and materiality.

As you will see going forward, we will turn in this class to the judge's discretion to make our case that that which we do not want to do, if it can be helped, that is, expose IC sources and methods in open court, can be accomplished without offending our Constitution, statutes or case law.

Discoverable Information:

= impeachment of witnesses [*Giglio*];

= Defendant's statements [FRCP 16];

= Other witness' statements [*Jencks*].

Continuing our review, let's recall that *Giglio* requires us to turn over information from whatever source that can be used to impeach our witnesses.

The defendant's statements in the government's possession are discoverable according to FRCP 16.

Another statute, one we have not discussed but that also requires discovery, mandates that the government give to the defense, around the time of any witness' testimony, statements that witness has made to the government.

Discoverable Information:

= anything used at trial [FRCP 16];

= exculpatory information [*Brady*];

Of course, anything we intend to use at trial is discoverable and examination of it must be allowed in pre-trial discovery.

Brady commands us to turn over exculpatory evidence from any source known to us; not to put too fine a point on it, this includes exculpatory evidence known to us that is in the possession of the IC.

“Relevant Evidence”

FRE 401 “... evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

This slide you have seen before—here it is again. This is important! Thus, information in the IC that equates to evidence in a criminal case having any tendency to make the existence of a fact of consequence more or less probable *is relevant*. You can see that unless we are unconcerned with exposing sources and methods in criminal trials, we in law enforcement will not easily be able to work closely with the IC (and the IC will not want to work closely with us for the same reason).

“Material evidence”

Materiality = “any fact that is of consequence to the determination of the action.”

Also defined as . . .

Materiality is a legal concept that says, basically, this evidence is certainly relevant, and it is particularly so. The meaning for us in this class is that material evidence is something a judge would not be able to exclude to the defense in a criminal case.

I have taken some quotes from case law to help you understand the concept of materiality; this is one, a “fact of consequence to the determination of the action.”

“Material evidence”

**“A reasonable man would attach
importance . . .”**

Here is another = “a reasonable man would attach importance” to this evidence.

“Material evidence”

**“Information is material if it is
necessary to a determination”
of an issue.**

Necessary information is material information. You can see the law works with words. We are getting at something here.

Materiality

“Materiality” is relevance + . . .

**that is, materiality adds additional
meaning to “a fact with any
tendency . . .”**

Materiality can be defined as relevancy plus. For our purposes, once some evidence becomes material to a criminal case, a judge will have a very difficult excluding it from the case by use of the judge’s discretion under our FRE or FRCP.

**FRE 402 = Relevant Evidence
Generally Admissible; Irrelevant
Evidence Inadmissible.**

A quick review of relevancy: relevant evidence is generally admissible; irrelevant evidence is inadmissible.

**FRE 403 = Exclusion of Relevant
Evidence on Grounds of
Prejudice, Confusion, or Waste of
Time**

Relevant evidence can be excluded on grounds of prejudice, confusion or waste of time = the judge decides = judge's discretion.

“Relevant *and* material evidence”

Only evidence that is *relevant and material* to the defense must be disclosed to the defendant.

FRE 401- 403 and FRCP 16(d)(1)

Push comes to shove! If we are aware of IC association with criminal case, we may attempt to protect the IC's sources and methods by arguing to the judge that any information/evidence in IC files is not relevant, or if relevant is not material, to the defense. Therefore, in the judge's discretion, it need not be provided to the defense.

Note that what we are trying to do here is to protect IC sources and methods; we can do this if they peripheral to the case, that is, not important to the case. We cannot do this when IC sources and methods are essential to the case, for example, when the defendant is a member of our CIA who is on trial for espionage.

FRCP 16(d)(1)

The judge has *discretion* to:

Deny, restrict, or defer *discovery*

**This normally occurs pre-trial and
can occur *ex parte* and *in camera* . . .**

Let's recall FRCP 16(d)(1), which I highlighted for you in your FRE/FRCP workbook. FRCP 16 is our main discovery rule; FRCP 16(d)(1) allows discretion to trial judges to deny, restrict or defer discovery. If we are dealing with IC information then we will use this rule pre-trial in those extraordinary hearings known as *ex parte/in camera* hearings. That is, with the judge alone and elsewhere than in the courtroom, usually in the judge's chambers, and with the other side of the case, the defendant and his/her counsel, excluded, the Government will argue to the judge that the IC information should or can be excluded.

The defense, as well as the prosecution, is entitled to have *ex parte* and *in camera* hearings when necessary. This is especially true when the defense wants to introduce classified information as part of its attack on the Government's evidence.

**4 methods Americans
will accept (*so far . . .*)
to combine IC & LEA
collection efforts *and*
trial of the defendant**

This is a place-holder slide to announce the remainder of the class: we will discuss four methods that allow the combination of IC and LEA collection efforts in a given criminal case **WITHOUT NECESSARILY EXPOSING IC SOURCES AND METHODS.**

1. (b)(7)(E)

2. Use CIPA.

3. Use FISA.

4. Use Parallel Construction.

This is a place-holder slide. These are the four methods.

Why does this work?

Scher v. United States, 305 U.S. 251

(1938). A prohibition agent receives a “tip,” commences a surveillance and, as a result, sees defendant handling whiskey.

This works because this Supreme Court decision, a case involving a tip that led a revenue agent to conduct surveillance in a certain location where he saw the defendant handling contraband whiskey, blocks defense discovery of the reason why the agent was so positioned as to see the illegal behavior.

**The court held that the source of the tip
which caused the defendant to be
observed is *unimportant*.**

And . . .

The Supreme Court said the defendant had no discovery right to learn of the source of the tip, the source was unimportant (not relevant) to the reason the law enforcement officer acted as he did.

***The legality of the agent's actions did not
depend on something told to the agent***

***But did depend on *what the agent
saw (heard) when he investigated.****

The legality of the agent's actions did not depend on what he was told but on what he saw or heard when he investigated.

Method #2

Use CIPA.

This is a place-holder slide announcing the next method to be discussed.

“CIPA was designed to establish procedures to harmonize a defendant’s right to obtain and present exculpatory material upon his trial and the government’s right to protect classified material in the national interest.” *United States v. Pappas*, 94 F.3d. 795 (2nd Cir. 1996).

This slide is meant for the students to read to themselves; discussion follows if they have questions. The instructor alerts the students to the wording that says the government has a right to protect classified information from disclosure in criminal trials.

Method #2

**CIPA permits pre-trial, *ex parte*,
in camera review of classified
information to determine
relevancy.**

This is a place-holder slide reminding the students of information with which they should be familiar.

Method #2

**If classified information must be
part of the Gov. case, we use
CIPA to limit the damage to
S&M interests.**

This slide also reminds students of information they already have been exposed to but which they may not have realized = if we, the government, need to introduce classified information we will have to plan ahead because there are going to be lengthy pre-trial hearings to protect as much of the IC's sources and methods of collecting this information as we can.

If a defendant introduces classified information into the case, the defendant must notify the judge and request a CIPA hearing.

Now the other side of the coin; there are cases where the defense wants to introduce classified information, that is, expose classified information in a public trial. The government has a right to try to protect as much of the sources and methods of collection and the classified information itself as it can. Thus, in this circumstance, the defense must ask for *ex parte/in camera* hearings in order to apprise the trial judge of this information and to get the judge's rulings under CIPA. Once the judge has agreed with the defense that classified information is relevant and material, then the Government will be informed that the defense will be allowed to introduce this evidence. The Government then has further decisions to make including to decline the prosecution or to request the judge to make certain other rulings permitted by CIPA to protect the IC's sources and methods (without, of course, disadvantaging the defense's case).

Method #2

In accordance with CIPA, the defendant must proceed in this manner or the classified information the defendant wishes to introduce can be excluded.

And, if the defense does not do this, the defense/defendant can be prevented from introducing this information.

Method #2

**CIPA helps to limit S&M damage,
but it must allow *Brady* material
and anything the judge, in the
judge's discretion, says is
discoverable by the defendant.**

This slide serves to announce another concept that the students should have realized but may not have. That is, we cannot use CIPA to exclude *Brady* information held by the IC because the Constitution, according to the Supreme Court, requires it to be disclosed to the defense.

This slide also serves to remind the students that the judge's discretion can work against us—we may have a brilliant argument as to why certain information is not material to the defense and thus may be excluded. The judge may disagree and order that the information is discoverable.

Method #4

Use Parallel Construction.

This is a place-holder slide announcing the fourth method to be discussed in this class.

Method #4

We accomplish this by using a Taint Review Team.

How do we do this? We use a Taint Review Team.

Method #4

What's our argument?

That is, while there is some relevance to the information for the defendant, it is not material to the defense or defense strategy.

This is a place-holder slide reminding the students that material information is discoverable while information that is only relevant may not be discoverable.

“Relevant Evidence”

FRE 401 “. . . evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

This is a place-holder slide re-emphasizing what has just been emphasized.

FRE 402 – relevant evidence generally admissible . . . (meaning not all relevant evidence, including *classified* evidence, is admissible – we must convince the judge); evidence that is not relevant is not admissible.

This is a place-holder slide re-emphasizing what has just been emphasized.

FRE 403– “Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

This is a place-holder slide re-emphasizing what has just been emphasized.

FRCP 16(d)(1)—“At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect *ex parte*. If relief is granted, the court must preserve the entire text of the party’s statement under seal.”

This is a place-holder slide re-emphasizing what has just been emphasized.

A final point to be made is that the judge, when ruling in our favor, causes all his/her rulings and the information examined, including the Taint Review Team’s arguments to the judge, to be part of the appellate record for review. Thus, on appeal, if there is one, the appellate judges will review these decisions by trial judge. This is also done *ex parte* and *in camera* in the appellate court. In this circumstance, neither the defense team nor the prosecution team on appeal will be allowed to see this information, although they will be invited to make appellate arguments that the process is unfair, unconstitutional etc.

One can see that this presents quite a problem for these lawyers. Nonetheless, this is the way this matter is handled. You can see that if this works as the Government hopes it will, the sources and methods of the IC are fairly well protected throughout the trial and appeal or appeals of this case.

LESSON PLAN
Archive Sheet

Lesson Plan Number: 052

Lesson Plan Title: TRAFFIC STOPS - LEGAL ISSUES

I am requesting that the attached lesson plan be:

- ☐ Replaced with updated material.
- ☐ Retired. The information is no longer taught.

☒ Other: NOT CURRENTLY TAUGHT BUT
MAY BE IN THE FUTURE

(b)(6)

5-4-11
Date
6/9/11
by

Chief Counsel Signature & Date

**United States Department of Justice
Drug Enforcement Administration
Office of Chief Counsel**

LESSON PLAN FACE SHEET

COURSE INFORMATION:

Title of Instruction:

(b)(7)(E)

Time Allotted:

60 Minutes

Target Group:

State & Local LEOs meeting with Macon
RO Agents (part of larger day-long agenda)

Location of Training:

Macon, GA

Method of Instruction:

Lecture, handouts

Training Aides:

PowerPoint

Date of Training:

May 15, 2009

APPROVALS:

Instructor:

Division Counsel Program Supervisor:

Deputy Chief Counsel:

Associate Chief Counsel CCT:

(b)(6)

5-8-09

5-8-09

5-11-09

5-22-09

INSTRUCTIONAL GOAL: Provide attendee with information necessary to understand legal issues involved in (b)(7)(E) traffic stops and advise of significant recent Supreme Court decisions that may be implicated in such stops. Instruct attendee to consult respective legal advisors and/or Division Counsel regarding application of recent Supreme Court decisions to pending investigations.

INSTRUCTIONAL OBJECTIVES: Based upon the information presented in this lesson, the student will:

(b)(7)(E)

5. Gain an understanding of some recent U.S. Supreme Court decisions that are likely to be implicated in such traffic stops.

COURSE MANUSCRIPT (OUTLINE AND/OR POWERPOINT):

See attached

BIBLIOGRAPHY

Legal Citations:

Arizona v. Gant, U.S. Sup. Ct., No. 07-542 (decided 4/21/09)

Arizona v. Johnson, __ U.S. __, 129 S.Ct. 781, 784 (2009)

Illinois v. Caballes, 543 U.S. 405, 410 (2005)

Scott v. United States, 436 U.S. 128, 138 (1978)

Whren v. United States, 517 U.S. 806, 813 (1996)

State v. Bute, 250 Ga.App. 479, 480 (2001)

TRAFFIC or (b)(7)(E)
STOPS
Legal Background



(b)(6)
Atlanta Division Counsel

(b)(7)(E)

Disclaimers

- Limited Case Analysis
- Not Comprehensive Analysis of Law re Highway Stops
- Focus on Recent Federal Rulings
- Federal v. State Law
- Proper Sources of Comprehensive Training

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Legal Justification

(b)(7)(E)

- "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved... Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analyses."

Whren v. United States

517 U.S. 806, 813 (1996)

Officer's State of Mind: Scott v. United States

- "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v. United States*
436 U.S. 128, 138 (1978)

GEORGIA CASE LAW

"Where the officer observes the violation of a traffic law, the resulting stop is not pretextual." *State v. Bute*, 250 Ga.App. 479, 480 (2001) (*citing Whren*).

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

*Significant Federal Case
Law Developments*

Pat-down of Passenger

Arizona v. Johnson
129 S.Ct. 781, 784 (2009)

"...in a traffic stop setting, the first *Terry* condition – a lawful investigatory stop – is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity."

*Significant Federal Case
Law Developments*

Use of Canines (dog sniffs)

Illinois v. Caballes
543 U.S. 405, 410 (2005)

"A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment"

*Significant Federal Case
Law Developments*

Search Incident to Arrest

Arizona v. Gant
U.S. Supreme Court, decided 4/21/09

"Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment ... or it is reasonable to believe the vehicle contains evidence of the offense of arrest"

Questions?

(b)(6)

Atlanta Division Counsel

(b)(6)

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES DRUG ENFORCEMENT ADMINISTRATION

LESSON PLAN
TRAFFIC STOPS - LEGAL ISSUES

Presented By:

(b)(6)

Division Counsel
Miami Field Division

(b)(6)

LESSON PLAN FACE SHEET

TITLE OF INSTRUCTION: Traffic Stops-Legal Issues

TIME ALLOTTED: One Hour -- One Hour and Thirty Minutes

TARGET AUDIENCE: Special Agents, Experienced Task Force and non-Task Force Officers

INSTRUCTORS: (b)(6)
Division Counsel
Miami Field Division

METHOD OF INSTRUCTION: Lecture, Handouts, and Power-Point

DATE:

APPROVALS:

Instructor: (b)(6)
Miami Division Counsel

Associate Chief Counsel: (b)(6)

Associate Chief Counsel CCT: (b)(6)

Deputy Chief Counsel: (b)(6)

5/17/07

OBJECTIVES

A. INSTRUCTIONAL GOAL:

After this block of instruction, the student will have the necessary information to understand the legal issues concerning a (b)(7)(E) "traffic" stops.


B. INSTRUCTIONAL OBJECTIVES:

Based on the information presented in this lesson, the student:

(b)(7)(E)

4. Will describe proper treatment of traffic stop during court proceedings.

TRAFFIC or (b)(7)(E)
STOPS
Legal Background



(b)(6)
DEA Miami-Division Counsel

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

Officer's State of Mind

(b)(7)(E)

- "We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved... Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analyses."

Whren v. United States
(1996) 517 U.S. 806, 813.

***Officer's State of Mind:
Scott v. United States***

- "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v. United States* (1978) 436 U.S. 128, 138.

FLORIDA CASE LAW I

"The only concern under the Fourth Amendment is the validity of the basis asserted by the officer involved in the stop . . . The correct test to be applied is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop." *Dobrin v. Florida Department of Highway Safety and Motor Vehicles*, 874 So.2d 1171, 1173-74 (Fla.), *cert. denied* 543 U.S. 957 (2004).

FLORIDA CASE LAW II

"In sum, an officer's state of mind, motivation, or subjective intent plays no role in the ordinary probable cause analysis under the Fourth Amendment or Art. I, section 12 of the Florida Constitution." *State v. Perez-Garcia*, 917 So.2d 894, 897 (Fla. 3rd DCA 2005)

(b)(7)(E)

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
OFFICE OF CHIEF COUNSEL

LESSON PLAN FACE SHEET

COURSE INFORMATION:

Title of Course: (b)(7)(E)
Time Allotted: Two to three hours
Target Group: Federal and state law enforcement personnel
Location of Training: DEA Field Offices and Training Locations
Methods of Instruction: Lecture, Discussion
Training Aids: Powerpoint Presentation
Date: As Requested

APPROVALS:

Instructor:

(b)(6)

6/6/11

Associate Chief Counsel CCM:

(b)(6)

6/28/11

Associate Chief Counsel CCT:

(b)(6)

6/28/11

Deputy Chief Counsel:

(b)(6)

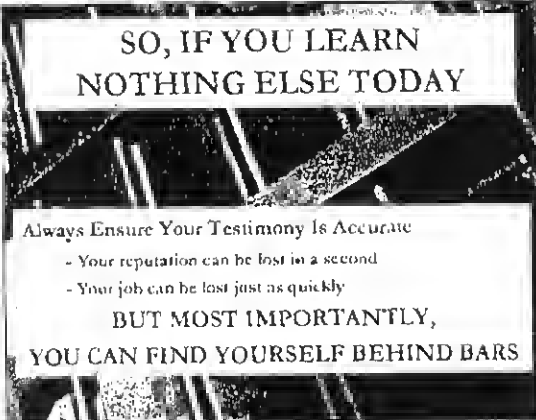
INSTRUCTIONAL GOAL:

Familiarize DEA personnel as well as state and local law enforcement officers with the legal underpinnings and foundational concepts of (b)(7)(E)

INSTRUCTIONAL OBJECTIVES:

By the end of this period of instruction, the learner will be able to define.

- 1) (b)(7)(E)
- 2)
- 3)
- 4)
- 5)
- 6)
- 7)
- 8) Identify basic practical considerations and legal principles associated with consensual searches.
- 9) Articulate basic legal principles associated with investigatory detentions and probable cause arrests.

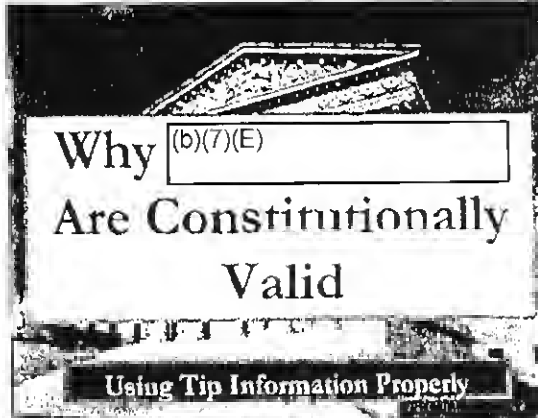


**SO, IF YOU LEARN
NOTHING ELSE TODAY**

Always Ensure Your Testimony Is Accurate

- Your reputation can be lost in a second
- Your job can be lost just as quickly

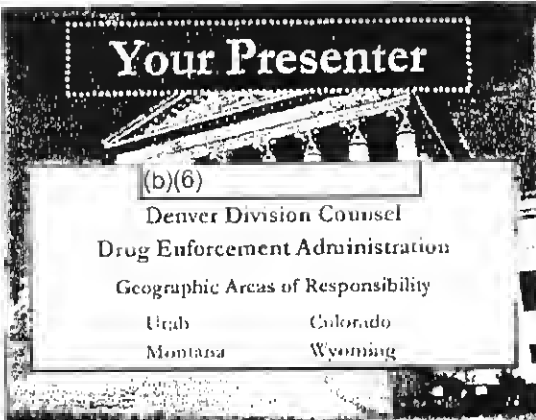
**BUT MOST IMPORTANTLY,
YOU CAN FIND YOURSELF BEHIND BARS**



Why (b)(7)(E)

**Are Constitutionally
Valid**

Using Tip Information Properly



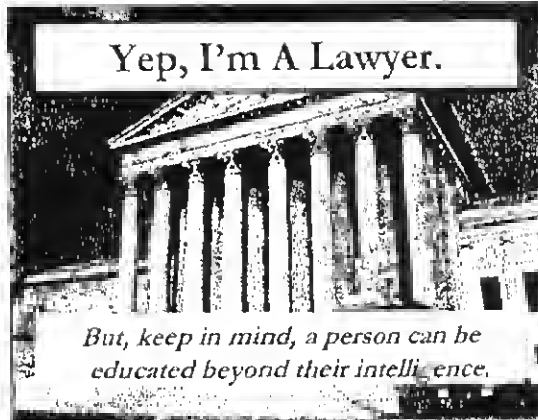
Your Presenter

(b)(6)

Denver Division Counsel
Drug Enforcement Administration

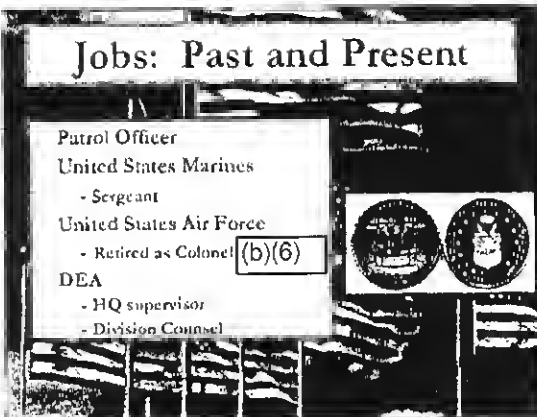
Geographic Areas of Responsibility

Utah	Colorado
Montana	Wyoming



Yep, I'm A Lawyer.

*But, keep in mind, a person can be
educated beyond their intelligence.*



Jobs: Past and Present

Patrol Officer
United States Marines

- Sergeant

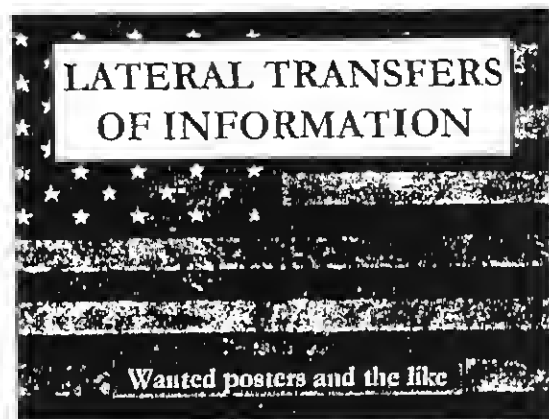
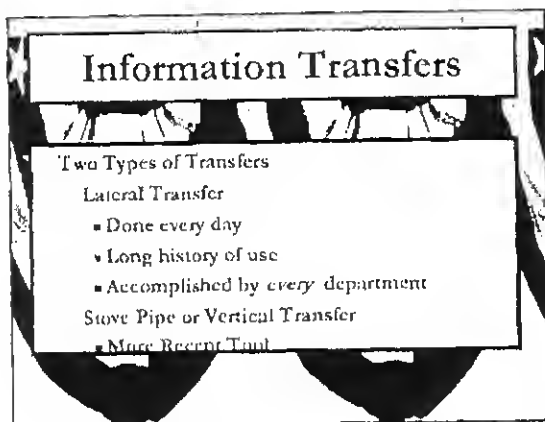
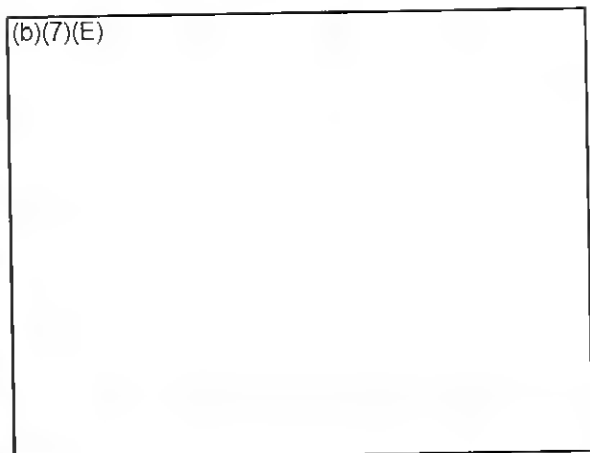
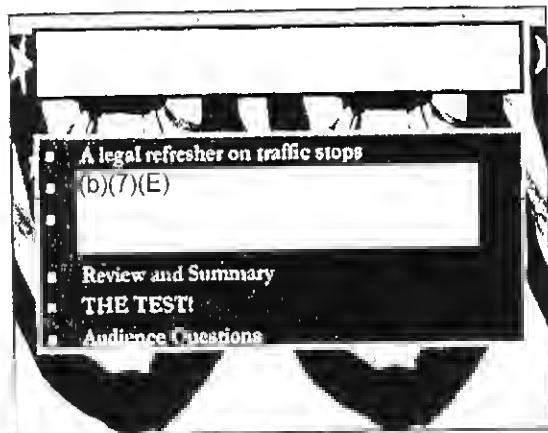
United States Air Force

- Retired as Colonel (b)(6)

DEA

- HQ supervisor
- Division Counsel

(b)(7)(E)



Lateral Transfers: Historic

Back in the day, sheriffs sent telegrams and tacked up wanted posters to catch bad guys

Purpose: to transfer information



Lateral Transfers Today

"Wanted" information is disseminated by:

- Fax machines, emails, and text messages
- Phone conversations
- Car to car radios or computers
- Law enforcement databases
- Radio, TV, and mass media

Lateral Transfers



- Regardless of the form of communication
 - - One officer provides reasonable suspicion or probable cause information to another officer
 - - The expectation and understanding is that another officer will take action based solely on the info provided by the first

Lateral Transfer Example

Report of Armed Robbery

- 1st Officer arrives on scene & broadcasts description of suspect via radio
- 2nd Officer arrests suspect based solely on information provided by 1st officer

Lateral Transfer Example

It is irrelevant that the 2nd Officer did not verify the p/c

- All responding officers can rely on the p/c established by the first officer
- The first officer is essentially saying "stop this person because I said so."

An Obvious Question

Can a department get a request like this?

- A car or person is headed your way
- You are told - develop your own legal basis to execute a stop, *if you can*
- But, *if you cannot*, stop the vehicle anyway because we have p/c for the car or person

Case Law Examples
Lateral Transfers of Information

U.S. v. Hensley, 105 S.Ct. 675 (1985)

Robbery committed in one jurisdiction

- Investigating officer issues WANTED flyer based upon information collected in scene as well as informant information
- Officers in neighboring jurisdiction solely rely on flyer when they recognize suspect
- Traffic stop of vehicle leads to arrest of suspect and occupant (felon in possession of gun)

Hensley
(cont'd)

Supreme Court finds that the neighboring jurisdiction rightfully relied upon the reasonable suspicion or probable cause provided by first department

- Wanted poster provided reasonable suspicion for the traffic stop
- Court also opines that officers relying in good faith upon "flyer" have defense to civil suit

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

**BEFORE WE GO ANY
FURTHER**

Let's take a break
Be back in 10 minutes



*Welcome Back
From the Break*

Before We Head Back Into
(b)(7)(E) Here
Some Stuff That Might Help

**Some Other
Legal Stuff**

State Laws Or Department
Policies Could Be More Stringent

**Protective
Sweeps**

What are the limits?

SPECIAL

Protective Sweeps

You enter a house to execute an arrest warrant

You are in the main room of the home

There are four rooms that immediately adjoin the room you are in

- Can you search those rooms for a threat to your safety and the safety of other officers?

ANSWER: YES

The courts have accepted the protective sweep doctrine – a judicial doctrine which allows officers to look into areas for a threat to their safety and others

- Must be reasonable in size and breadth
- Must be limited in duration
- Must be limited to those areas in which a person may pose a harm to officers

So, where can you look?

In closets?

Underneath a bed?

Behind a large sofa?

Inside a storage room with an exterior lock through a hasp?

Inside of a jewelry box?

In a small bedside table's drawer?

Underneath a bathroom sink?

In the 9th and 10th Circuits

Federally: A protective sweep must be accompanied by an arrest or otherwise lawful judicial action

This is the "minority" view – most other circuits do not require an arrest or otherwise lawful action

- Colorado, Utah, Wyoming, Kansas, New Mexico and Oklahoma, plus Yellowstone NP are all in the 10th Circuit
- Montana is in the 9th Circuit

You Arrest The Suspect Outside

Can you initiate a protective sweep inside the structure when taking the suspect into custody if he or she is outside but immediately adjacent a structure?

- Yes, under Federal caselaw, you can sweep these areas provided they are in reasonable proximity and the sweep is short and focused

"Common" Areas

Can they be private in a shared home?

Shared Home

You are at a structure occupied by a married couple. Wife tells you that husband uses cocaine and that his stash is upstairs in a library.

- Wife gives you permission to enter the home and the library.
- Husband is physically present and objects to the search, saying that the library is his and his alone.
- Can you legally enter the library with only the wife's consent?

ANSWER: NO

The consenting spouse had no authority to permit officers to enter the husband's space when the *physically present* husband objected.

The cocaine-using husband was an attorney who told officers that he *unequivocally objected* to their search.

- Case turned on his presence and objection. An officer can *reasonably rely* on the consent of a co-habitant if the other party is absent provided there are no indications that the area at issue is private.
- In this case, they could have gotten a warrant.

• *Georgia v. Randolph*, 547 U.S. 103 (2005)

How about:

You Are At the Front Door

You have a warrant for John Doe's arrest.

As you are at the door of a structure and you observe John Doe in the background.

- Can you legally enter the residence at that time to physically seize the person of John Doe?

- Follow your department's policies and common sense.

Can an officer order a passenger out of a vehicle and subsequently pat them down?

Is it constitutional to take action against a passenger when the passenger was not the *reason for the stop*?

Officers on patrol stop vehicle for a *traffic* infraction

The traffic stop is made in a high crime area.

There is no belief that any passenger is involved in criminal activity.

Back-up officer engages passenger in conversation (seated in rear of car).

- Officer observes gang type clothing and tattoos.
- Officer learns that passenger is from area where there are gangs and that passenger had been in prison.

Officer Orders Passenger To Exit The Vehicle

Based upon her experience and the facts as she knows them, officer reasonably believes that the passenger is armed.

- As passenger exits the car, officer pats the suspect down and feels the butt of a gun.
- A struggle ensues and the passenger is arrested. Charged with possession of a weapon. Defense moves to suppress the evidence of the search.

- On appeal, who wins?

The Search is Valid

The Supreme Court found that the officer's actions were lawful

- The original traffic stop must be lawful
 - In this case, a traffic infraction had occurred
- To proceed from an investigatory stop to a frisk, the officer must reasonably suspect that the individual is armed and dangerous
 - The officer developed this information from her questions

Arizona v. Johnson, 129 S. Ct. 781 (2009)

IS DEA PROHIBITED FROM ENFORCING THE CSA?

Does the Department of Justice Guidance of 10/19/09 Really Say That 'Medical' Marijuana Is Legal?

ANSWER: NO.

- [The] prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continue to be an enforcement priority of DOJ (page 2 of 10/19/09 memo)
- *Claims of compliance with state law may mask operations inconsistent with the terms, conditions, and purposes of state laws and Federal law enforcement should not be deterred by such assertions.*

Interesting Fact 1

- DEA does not target individual marijuana users in possession of inconsequential quantities
 - Cancer and AIDS patients only comprise 3% and 1% (respectively) of state registry patients
 - Majority of patients have chronic pain or muscle spasms
 - Most patients are male & between the ages of 18 - 24
- Instead, DEA seeks to dismantle and/or disrupt the highest level of violators

Interesting Fact 2


- While it should come as no surprise to this audience, there is no science that has concluded marijuana is medicine
- Marijuana remains a Schedule 1 Substance
 - No accepted medical use in treatment in the United States
 - High potential for abuse
 - There is a lack of accepted safety for the use of the drug under medical supervision

Interesting Fact 3

- Marijuana is harmful
- Marijuana is addictive
- Marijuana is often a stair-step drug, a bridge to other substances
- Marijuana is especially harmful to youthful users

For More Information

- DEA's public website (www.DEA.gov)
- National Institutes of Health
- SAMSHA
 - Substance Abuse & Mental Health Services Administration
- Denver Division's Public Information Officer




(b)(7)(E)

(b)(7)(E)

Stated Formally
What the Courts Say

"We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analyses." *Whren v. United States* 517 U.S. 806, 813 (1996)

- What does this fancy phrase mean?



(b)(7)(E)

WHREN

... that this is not a search of the States.

Supreme Court precedent in *Whren v. United States* and *Illinois v. Gates* holds that





Dealer Tag Example

In Georgia during the 1980's, you could drive a car with a dealer "drive-out" tag on it

- Overheard a family brag that they had never purchased tags for their cars and that the "scupid" cops never caught them

My subjective intent was to fix this situation

Vehicle Tag Example

Located the family's residence, noted all the cars in the driveway, and watched for one of those vehicles to be on a public roadway

Observed one of those cars on the roadway

- Ticketed teenage driver for no tag and bad tires

Vehicle Tag Example

Dad comes to Court arguing that I was *lying in wait*, telling the Judge that he had seen a black & white hanging around his dirt road

- Judge says that might be so, but it doesn't alter the fact that car wasn't registered and the tires were bad
- In the dad's eyes, my motivation in making the traffic stop was the issue, but the judge nixed that

The Judge was right - my stop was valid

- Why? - because my subjective intent was irrelevant; I HAD PROBABLE CAUSE FOR THE STOP

■ "We have since held that the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v. United States* 436 U.S. 128, 138 (1978)

Citations

10th Circuit
U.S. v Finney, 2009 WL 612488, 316 Fed. Appx. 752 (2009)

9th Circuit
U.S. v Franklin, 87 Fed.Appx. 22 (2003)

Colorado
People v. Marujo, 192 P.3d 1003 (2008)
People v. McClain, 149 P.3d 787 (2007)

Citations

Wyoming
 Fertig v. Wyoming, 146 P.3d 492 (2006)

Montana
 State v. Bar-Jonah, 102 P.2d 1229 (2004)

Utah
 State v. Applegate, 194 P.2d 925 (2008)
 State v. Wynwood, 164 P.2d 397 (2007)

Fertig v. Wyoming

146 P.3d 492

Fertig v. Wyoming

146 P.3d 492

Officer assigned to task force receives information (b)(7)(C) that:

- That illegal drug activity was occurring at a specific residence
- That Mr. Fertig would be at the residence
- That Mr. Fertig would possibly be in possession of drugs

Fertig v. Wyoming

146 P.3d 492

That officer:

- Establishes surveillance on the house
- Notifies two other officers and asks that they position themselves on the routes that Mr. Fertig would likely take when he leaves the house
- Advises the two other officers that he needs them to develop probable cause for a traffic stop because he wanted an opportunity to look for evidence of drugs
- There is little or no doubt that Mr. Fertig is to be stopped

Fertig v. Wyoming

Fertig departs home at 0240

- Speeding 38/30 and is stopped
- Mr. Fertig is asked for license, registration and proof of insurance
- He produces license but has to look for the other documents in the dash
- When he opens his dash, officer observes spoon with crystalline rings on its surface
- Officer knew from experience that this was used to heat meth for injection

Fertig v. Wyoming

Officer determines that he had p/c to search the vehicle

Officer asks suspect to step from vehicle

- Suspect is handcuffed and searched
- 10 grams of meth is retrieved from suspect's shirt pocket
- Charged with possession of meth

Suspect moved to suppress search

The Good Guys Prevail

The Court upholds the search

- The prosecution conceded that the stop was a pretext and that officers waited to develop p/c so that they could search the car

The Court acknowledged that Wyoming's constitution may offer more protection than the Federal Constitution

- Court found that actions were permissible under both Federal and state law

Court's Language

Fertig, Id at 501.

"We conclude that a traffic stop initiated by a law enforcement officer after personally observing a traffic violation does not violate . . . the Wyoming Constitution, regardless of the officer's motivation. Our holding in this case addresses only the initial police action upon which the . . . stop was predicated. The scope, duration, and intensity of the seizure, as well as any search made by the police subsequent to that stop, remain subject to . . . judicial review."

A Refresher

Traffic Stops, Plain View
and Other Things

REASONABLE SUSPICION

- Reasonable suspicion is less than:
 - a preponderance of the evidence (51%)
 - probable cause (reasonable person standard – still not 51%)
- And it cannot be quantified precisely
Don't let defense counsel tell you otherwise

PROBABLE CAUSE

- Information sufficient to warrant a prudent person's belief that an individual committed a crime or that evidence of a crime or contraband would be found in a search.

Question

- A patrol officer observes two males sitting in a pickup truck in a high crime area at 0200 on a Sunday morning. They are located behind a business that the officer knows is closed, and the truck is backed up near the rear door. The officer initiates contact with the two individuals. Absent any information, does the officer have probable cause to effect their arrest for burglary?

Answer: No

- But the officer has enough information to possess a reasonable suspicion about their activities and this justifies their brief detention for questioning and other appropriate follow-up
- No one factor governs the officer's actions
Instead, it is the totality of the circumstances that make the officer's actions reasonable
- The length of contact is reviewed through a reasonableness standard

Another Question

- An officer on routine patrol sees a car make an illegal left turn in a posted intersection
- Is the officer's subsequent traffic stop of that vehicle based upon reasonable suspicion?

Answer: No

- An officer's stop derived from a witnessed traffic offense is based upon probable cause, which of course exceeds the level of belief found in a reasonable suspicion.

What Justifies A Traffic Stop?

And How Long Can It Last?

U.S. v Dennison
410 F.3d 1203 (10th Cir. 2008)

- "A traffic stop is reasonable at its inception if the detaining officer, at the very least, reasonably suspects the driver has violated the law."
• Dennison, 10, at 1207 - 1208.
- "To satisfy the Fourth Amendment's reasonableness requirement, only a 'minimal level of objective justification' for a traffic stop need exist."
• Dennison, 10, at 1207.

Traffic stop: detention vs. seizure?

- The detention and questioning of a person after being stopped by a law enforcement officer must be reasonable in scope, duration and intensity.

Was The Contact Consensual?

- Factors reviewed by a court include:
 - Whether the officer engaged in persistent and sustained questioning
 - Whether the questions asked extended to topics unrelated to the traffic offense
 - The tone and inflection of the officer's voice
 - The officer's demeanor
 - Whether weapons were drawn
 - Were papers and documents returned
 - Was the person's access to their vehicle blocked

Detention vs. Seizure

- Typically, a traffic stop must last no longer than it would reasonably take for an officer to request a driver's license and vehicle registration, run a computer check, and issue a citation.
- Drivers should then be allowed to proceed without further delay once the officer validates that the driver has a license and is entitled to operate the vehicle.

Plain View

(Not Recognized In Montana State Law)

- What's required:
 - Officer must lawfully be in a position to view the object
 - The object's incriminating character must be immediately apparent
 - There must be no need to inspect the object
 - The officer has a lawful right of access to the object
- The officer may seize it without a warrant

■ U.S. v. Holmes 311 Fed Appx 824 (10th Cir. 2004)

NOTE

- An officer's intent in stopping an individual will be relevant if the officer's thought process is influenced by impermissible considerations.
 - Race
 - Gender
 - National Origin
 - Creed
 - Sexual preference

GANT v. ARIZONA

129 S.Ct. 170 (2009)

Searches Incident To Arrest

GANT – WHAT IS IT?

- It is a ~~search incident to arrest~~ case
- Because of that, its holding applies to ~~searches incident to arrest~~

DEPUTY

SHERIFF

GANT FACTS QUICKLY

- Officers have p/c to arrest driver of vehicle
- They handcuff and place him in the back of a cruiser
- Incident to the driver's arrest, they return to the vehicle and search it - discovering evidence that they then use against him
- The Supreme Court suppresses the search

GANT

- Police may search a vehicle pursuant to a recent occupant's arrest only if the arrestee is
 - (1) within reaching distance of the passenger compartment at the time of the search
- OR
- (2) it is reasonable to believe the vehicle contains evidence of the offense of the arrest (e.g., if the arrest is for driving while intoxicated, the officers would be looking for evidence of that crime).

GANT - WHAT IT IS NOT

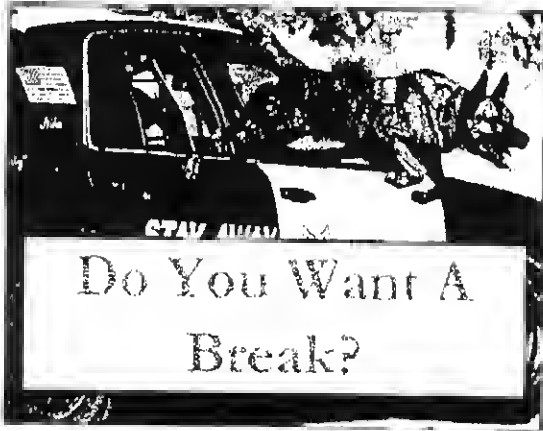
- Gant does not limit or affect other exceptions to the 4th Amendment, such as:
 - Plain view searches
 - Emergencies
 - Motor Vehicle Exceptions
 - Destruction of evidence
 - Open Fields
 - Border searches
 - Areas beyond the curtilage of a structure

If You Want To Worry About Something

- Then worry about warrantless roadside dumps of "smart" phones and other electronic devices that store items such as photos, text messages, etc.

Courts are rendering inconsistent decisions nationally. Courts have become wary of 'dumpster dives' into the vast information stored on these devices. Because these devices may have apps and password protected features, a full forensic exam by trained experts via a computer may be appropriate.

(b)(7)(E)



(b)(7)(E)

Alternative 3

- Prosecutor files motions *in limine* or similar motion to preclude or restrict the defendant's access to the information provided to the state and local organization by DEA
- Sensitive information often submitted to judge only
- Judge rules on motion
 - Defendants do not see information if motion is granted

Alternative 4

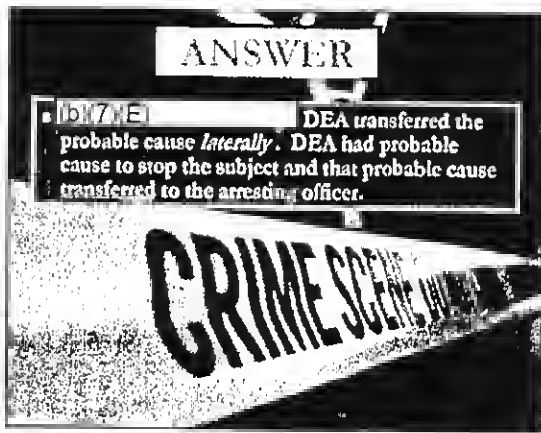
- Departmental procedures require notification to designated point of contact
 - That person in turn provides the information to those who are taking the appropriate actions
 - Example: commander advises officer to watch for vehicle and make stop if p/c exists
 - Patrolman's report reflects that his supervisor told him to watch for a certain make and model of car and to make stop if p/c exists

Alternative 5

- Dismissal of the case is the last resort
 - If motions and appropriate legal actions do not succeed AND
 - If there is still a need to protect the "walled off" source or collection method
- Then DEA will request that the prosecution be dismissed
 - Bottom line: DEA will rarely if ever disclose privileged or sensitive information from the other side of the "wall"
 - And, remember, contraband is contraband

- A wall-off or pretext stop is constitutionally permissible provided:
 - there is an independent basis supporting the action
 - the limits of any search are respected
- An officer's subjective intent behind his or her actions is irrelevant provided there is a valid basis for their enforcement action

(b)(7)(E)



(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

QUESTION 8

- True or false. Controlling case law is clear: An officer's subjective intent when he or she executes a stop is irrelevant provided the stop is legally justified on other grounds.

DEA

ANSWER

- True. The United States Supreme Court and the Supreme Courts of Montana, Wyoming, Colorado and Utah have all held that the subjective intent of an officer executing a (b)(7)(E) stop is irrelevant to the matter, provided a valid legal basis otherwise exists for the stop.

DEA

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

(b)(7)(E)

QUESTION 12



- True or false. An officer who testifies falsely under oath is immunized if the information at issue is derived from a source of information or collection activity that DEA cannot disclose.

ANSWER

- False.
- An officer should never testify falsely, regardless of what information is at issue or where the evidence came from.
- An officer's good intentions will not be a defense to a charge of perjury.
- The goal is to timely inform the prosecutor of this information so that he or she can proactively address any issues.

QUESTION 13



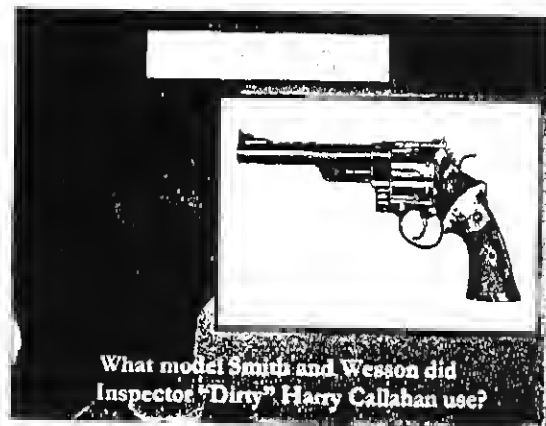
- True or false. Since an officer's subjective intent is not relevant to a probable cause stop of an individual or car, an officer would not be wrong in targeting all cars driven by persons of a certain "protected" characteristic (e.g., race or gender) after waiting to develop probable cause.

(b)(7)(E)


(b)(7)(E)

(b)(7)(E)

(b)(7)(E)




ANSWER



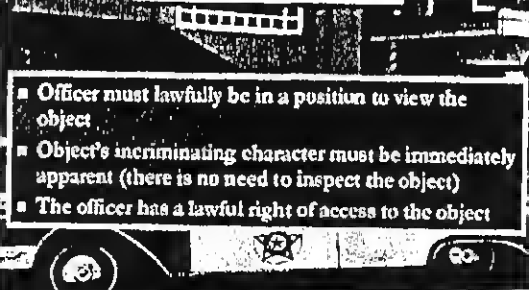
- Model 29
- Six shot
- 44 caliber
- But, do yourself a favor, forget Dirty Harry's cliché lines.

QUESTION 16



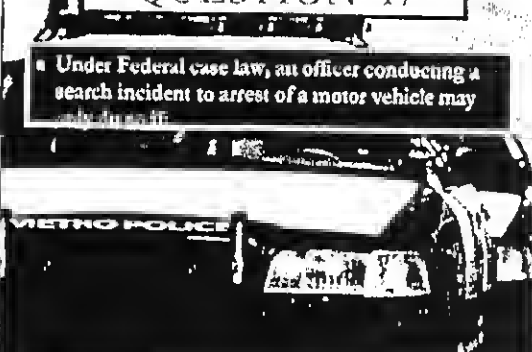
- What three elements are required to justify a plain view search?

ANSWER



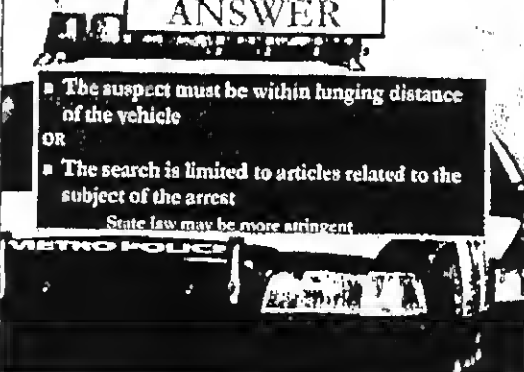
- Officer must lawfully be in a position to view the object
- Object's incriminating character must be immediately apparent (there is no need to inspect the object)
- The officer has a lawful right of access to the object

QUESTION 17



- Under Federal case law, an officer conducting a search incident to arrest of a motor vehicle may only search the

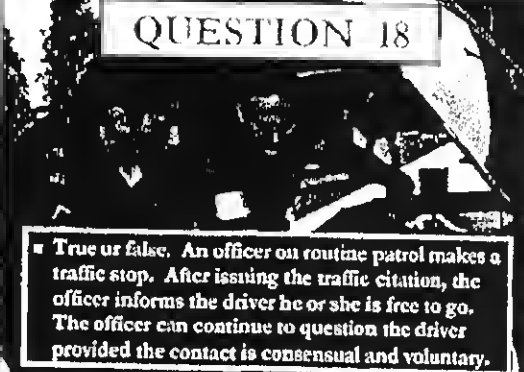
ANSWER



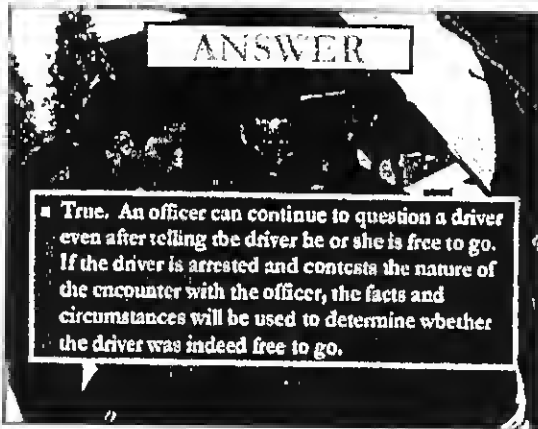
- The suspect must be within lunging distance of the vehicle
- OR
- The search is limited to articles related to the subject of the arrest

State law may be more stringent

QUESTION 18

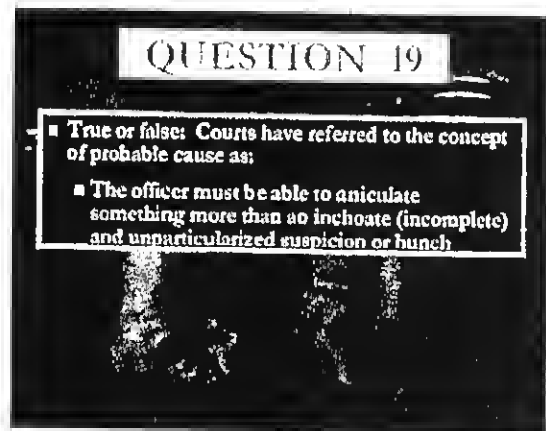


- True or false. An officer on routine patrol makes a traffic stop. After issuing the traffic citation, the officer informs the driver he or she is free to go. The officer can continue to question the driver provided the contact is consensual and voluntary.



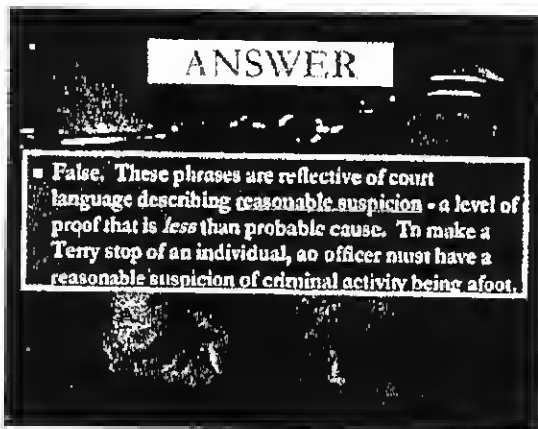
ANSWER

- True. An officer can continue to question a driver even after telling the driver he or she is free to go. If the driver is arrested and contests the nature of the encounter with the officer, the facts and circumstances will be used to determine whether the driver was indeed free to go.



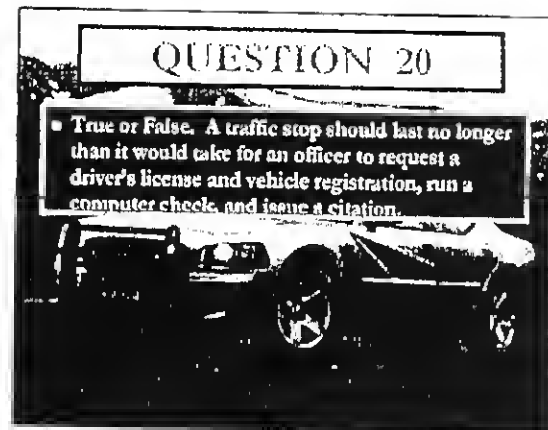
QUESTION 19

- True or false: Courts have referred to the concept of probable cause as:
 - The officer must be able to articulate something more than an inchoate (incomplete) and unparticularized suspicion or hunch.



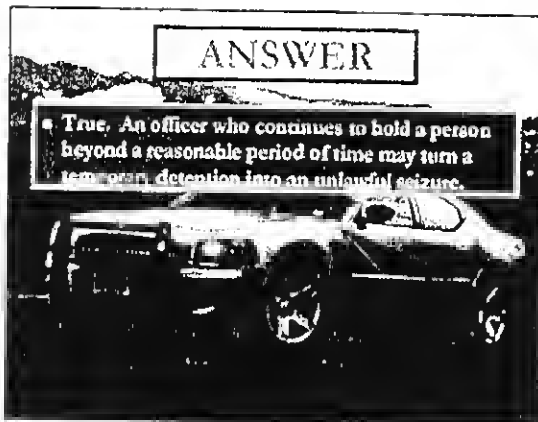
ANSWER

- False. These phrases are reflective of court language describing reasonable suspicion - a level of proof that is less than probable cause. To make a Terry stop of an individual, an officer must have a reasonable suspicion of criminal activity being afoot.



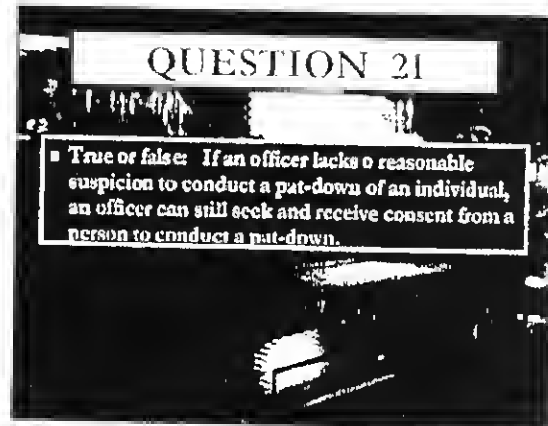
QUESTION 20

- True or False. A traffic stop should last no longer than it would take for an officer to request a driver's license and vehicle registration, run a computer check, and issue a citation.



ANSWER

- True. An officer who continues to hold a person beyond a reasonable period of time may turn a temporary detention into an unlawful seizure.



QUESTION 21

- True or false: If an officer lacks a reasonable suspicion to conduct a pat-down of an individual, an officer can still seek and receive consent from a person to conduct a pat-down.

ANSWER

- True. An officer can seek & receive the voluntary consent of an individual. If the officer's pat-down search leads the discovery of an object and the individual attempts to revoke his or her consent, then the officer will likely have reasonable suspicion to proceed with the contact even though it will no longer be consensual.

QUESTION 22

- A DEA employee from overseas calls a dog handler directly because of a prior case they worked together and requests assistance in a manner inconsistent with this Division's policies or your agency's practices. What should you do?

ANSWER

- Call your local DEA office.
 - DEA personnel should respect your chain of command
 - Help us by ensuring all levels of your staff understand that direct requests of this nature should be referred to the established system of notification

FINAL WORD

ALWAYS REMEMBER

OFFICER SAFETY

- Be safe in all that you do
 - Don't search alone
 - Remember your tactics
 - Focus on your work
- Do your J-O-B as if your life depends on it
 - IT DOES!

QUESTIONS???

Thanks for your attention

(b)(6)



UNITED STATES
DEPARTMENT OF JUSTICE

Drug Enforcement Administration



LESSON PLAN

**The Burmese Billionaire,
U.S. Anti-terrorism Laws &
Considerations on the Early
Intervention Dilemma**

United States Department of Justice
Drug Enforcement Administration
Legal Training Section
Justice Training Center

Lesson Plan Face Sheet

TITLE OF INSTRUCTION: The Burmese Billionaire, U.S. Anti-terrorism Law & Considerations on the Early Intervention Dilemma

TIME ALLOTTED: 2 hours

TARGET GROUP: Advanced Courses

INSTRUCTOR: Legal Instructor (b)(6)

METHODS OF INSTRUCTION: Lecture, Discussion, PowerPoint presentation

DATE:

Dec 16, 2008

PREPARED BY:

APPROVED BY:

(b)(6)

Deputy Chief Counsel for Operational Law

5-09

2-14-09

TRP Signature & Date

(b)(6)

4/13/09

Section I

OBJECTIVES

A. OVERALL SUBJECT OBJECTIVES:

To acquaint Special Agent, Diversion Investigator, Intelligence Analyst and Advanced FLEAT students with developing case law concerning and to review with them aspects of investigations of drug dealers with a foreign base of operations. This class will include a discussion of combined United States Intelligence Community/United States law enforcement efforts that have the principle objective of prosecuting foreign-based drug dealers in the United States as well as the practical aspects of cooperative international law enforcement efforts against foreign-based drug dealers. This class will introduce students to particular U.S. anti-terrorism laws that may have applicability to the behavior of foreign-based drug dealers. This class will introduce the students to recent examples of the phenomena known as the "Early Intervention Dilemma" as it applies to these objectives.

B. LEARNING OBJECTIVES:

1. Identify aspects of the Controlled Substances Act that have extraterritorial effect.
2. Identify the extraterritorial aspects of the Maritime Drug Law Enforcement Act.
3. Identify the extraterritorial aspects certain United States anti-terrorism laws.
4. Identify investigative activities in foreign countries that can produce evidence for United States prosecutions.
5. Identify ways to manage sensitive DEA information (that is, information that should not be disclosed in court or court documents subject to disclosure rules).
6. Describe the phenomenon know as the Early Intervention Dilemma and illustrate the dilemma with recent examples of the effect this phenomenon has on investigations.

CRITERION-BASED TEST ITEMS

Criterion Questions for Instructional Objectives.

None. This is a non-testable class.

CRITERION-BASED TEST ANSWERS

Answers to Criterion Questions:

None. This is a non-testable class.

ITEMS AND MATERIALS

A. ARTICLES:

This class uses current newspaper and other articles to illustrate the concepts discussed. As a consequence, the list of articles will change with some regularity over time. A list of articles in current use is appended to this lesson plan. As the articles change, a new appendix will be filed in the instructor's file copy of this lesson plan and with updates of the lesson plan as it is updated.

B. AUDIOVISUAL AIDS:

PowerPoint presentation; requires a computer, a projection device and a screen.

An easel and butcher block paper.

C. HANDOUT MATERIALS:

A Workbook that includes the Legal Instruction Objectives, pertinent PowerPoint slides and an outline of the subjects discussed in this class with space available for note taking.

D. OTHER:

None.

SECTION II

INSTRUCTOR MANUSCRIPT

A. INTRODUCTION.

1. **SELF-INTRODUCTION:** I am (b)(6) one of the legal instructors in the Legal Instruction Section.
2. **ATTENTION-GETTER/"GRABBER":** Our law reflects our current circumstances. Today, our law reflects the threat of international terrorism the entire world faces. Case law developed from investigations leading to the prosecution of international terrorists helps to define investigative techniques applicable to DEA drug investigations overseas. In addition, DEA's own law, the Controlled Substances Act, was recently amended so to criminalize the behavior of individuals who use illegal drug proceeds to benefit international terrorist organizations.
3. **NEEDS STATEMENT:** Your domestic controlled substances cases leads you to an international cargo carrier who transports the controlled substances into the United States and further provides you leads as to who is the originator of this shipment: the "Burmese billionaire." New case law instructs our investigations in the pursuit of international conspiracies into foreign arenas with the objective of successfully prosecuting targets such as the Burmese billionaire in the United States.
4. **THESIS STATEMENT:** We have the legal authority to make cases against foreign persons who conduct their criminal activities from foreign countries. Some of the techniques available to investigate the violator's criminal activity in foreign countries have been improved by case law developed in the pursuit of international terrorists.
5. **PREVIEW:** This two-hour presentation will remind advanced students of concepts of extraterritoriality and explore the use of these concepts in United States anti-terrorism laws. This presentation will review law enforcement investigative practices applicable to investigations overseas including cooperative activities with foreign law enforcement organizations and the United States Intelligence Community (IC). Finally, this presentation will introduce the advanced students to the phenomenon known as the "Early Intervention Dilemma," which illustrates the consequences attendant to deciding when to end an investigation of criminal and/or terrorist activities.

B. BODY.

1. **General.** This class reviews three International Law concepts that permit nations to extend their domestic law to behavior that occurs outside of their territory. This leads to a discussion of recent case law applicable to following domestic drug conspiracies to the co-conspirators who participate in the conspiracy from locations outside the territorial jurisdiction of the United States and to a similar discussion of United States anti-terrorism laws. The presentation reviews investigative practices useful in investigations overseas and includes discussion of ways to manage sensitive information obtained from the IC or foreign law enforcement agencies. Finally, this presentation introduces for discussion the phenomenon of the Early Intervention Dilemma by providing the students with copies of recent newspaper articles related to this phenomenon.

2. Body.

- a. **Extraterritoriality.** Remind the students of the concept of extraterritoriality, that is, United States *domestic* law that applies to the behavior of persons while those persons are outside the territorial jurisdiction of the United States as found in the:
 - (1) The Controlled Substances Act (CSA).
 - (2) The Maritime Drug Law Enforcement Act (MDLEA).
- b. **Three Customary International Law (CIL) principles.** The CSA and the MDLEA use one or more of three CIL principles of extraterritorial jurisdiction:
 - (1) **The Territorial principle:** all persons & things & effects within a nation's territory are subject to its laws; co-conspirators who act outside the territorial jurisdiction of a nation are liable for the criminal activities that occur within the nation's territory.
 - (2) **The Nationality principle:** nations may exert jurisdiction over their citizens in their territory and everywhere else as well as over vessels and aircraft that the nation "flags."
 - (3) **The Protective principle:** nations may criminalize activities that occur outside their territory but which have an adverse effect on their national security or the operation of their government.
- c. **The CIL principle of Reciprocity.** The International Law principle of "reciprocity" applies to the extraterritorial jurisdiction CIL principles.

That is, each nation that is intent upon applying its domestic law to behavior that occurs in other nations must do so in a way that is acceptable to the other nations of the world and must be willing to accept the principle that other nations may also criminalize the same behavior within its territory.

d. Examples of CSA provisions that have extraterritorial effect.

- (1) Unlawful importation: 21 U.S.C. § 952.
- (2) Possession on board a vessel, aircraft or carrier arriving or departing the United States: 21 U.S.C. § 955.
- (3) The Burmese Billionaire's violation, manufacturing, distributing or possession with intent to distribute controlled substances, *intending or knowing* the controlled substances *will be unlawfully imported into the United States*: 21 U.S.C. § 959(a).
- (4) New kid on the block. Foreign terrorist organizations, terrorist persons and groups: 21 U.S.C. § 960a.
 - i. An offense punishable under 21 U.S.C. § 841 if committed in the United States;
 - ii. Knowing or intentionally providing anything of value;
 - iii. To persons or organizations that have engaged in or engages in terrorist activity or terrorism;
 - iv. Basis for jurisdiction:
 - a The drug activity or terrorist offense violates United States law;
 - b The offense occurs in or affects interstate or foreign commerce;
 - c An offender provides anything of value for a terrorist offense or an offense that harms Americans or an American interest outside the United States.
 - d The perpetrator is a United States national (or legal entity) and the offense or drug activity occurs in whole or part outside the United States.

e The offender is brought to or found in the United States after the offense occurs.

v. Proof requirement: the offender must have knowledge that the person or organization has engaged in or engages in terrorist activity or terrorism.

e. **The MDLEA and extraterritorial effect.**

(1) A vessel of the United States. A vessel owned or operated by the United States or a state or a vessel flagged by the United States.

(2) A vessel subject to the jurisdiction of the United States. The main way a foreign-flagged vessel becomes a vessel subject to the jurisdiction of the United States is by the consent of the flagging nation to a United States law enforcement action aboard that vessel.

(3) Elements of the offense:

i Anyone knowingly or intentionally manufacture, distribute or possess with intent to distribute controlled substances;

ii On a vessel of the United States or a vessel subject to the jurisdiction of the United States;

iii Or, a United States citizen or resident alien on *any* vessel.

iv. **Note:** these criminal elements have nothing to do with the territory of the United States or citizens of the United States. That is, a foreign-flagged vessel carrying a cargo that includes illicit controlled substances, once the flagging nation has consented to a United States law enforcement activity aboard the vessel, has violated the domestic law of the United States even though the vessel is out of Colombia, bound for New Zealand and is crewed entirely by foreign nationals.

f. **Example of U.S. anti-terrorism laws with extraterritorial effect.**

(1) Harboring terrorists: 18 U.S.C. § 2339.

(2) Acts of terrorism transcending national boundaries:
18 U.S.C. § 2332b.

- (3) Providing material support to terrorists: 18 U.S.C. § 2339B.
- (4) Receiving military-type training from a foreign terrorist organization: 18 U.S.C. § 2339D.

g. Examples of overseas investigative activities.

- (1) Cooperative activities with Federal law enforcement agencies (LEAs) that are working in foreign countries such as FBI LEGATS, Diplomatic Security Agents, Customs or Treasury Agents, etc.
- (2) New case law from the November 24, 2008 *In re Terrorist Bombings* cases concerning cooperative activities with foreign nation LEAs.
 - i. Fifth Amendment rights when U.S. law enforcement personnel are involved in interrogations of persons in custody in foreign lands.
 - a. The admissibility at trial of statements made to U.S. agents by persons held in foreign custody is governed by the Fifth Amendment.
 - b. In so far as *Miranda* may apply, that decision is satisfied when U.S. agents inform such persons of their rights under the U.S. Constitution when questioned overseas. The warnings statement (advice of rights or AOR) need not be verbatim of the statement given in the United States.
 - c. U.S. agents need not become experts in foreign criminal procedure nor do they need to advocate for the appointment of local counsel on a foreign suspect's behalf.
 - d. Important for foreign cooperative interrogations, the court held as follows: "Our decision not to impose additional duties on U.S. agents operating overseas is animated, in part, by our recognition that it is only through the cooperation of authorities that U.S. agents obtain access to foreign detainees. We have no desire to strain that spirit of cooperation by compelling U.S. agents to press foreign government for the provision of legal rights not recognized by their criminal justice systems . . . the rule of

Miranda does not require conscripting our agents to be legal advocates for foreign detainees thereby disrupting the delicate relations between our government a foreign power.”

- ii. Wiretaps under foreign law. New case law from the November 24, 2008 *In re Terrorist Bombings* cases:
 - a The Fourth Amendment’s Warrant Clause has no extraterritorial application.
 - b Overseas electronic surveillance by U.S. LEAs of U.S. citizens is subject only to the Fourth Amendment’s reasonableness requirement.
 - c An overseas IC electronic surveillance of U.S. citizens’ does not require a warrant but must meet the reasonableness requirement.
 - d The Government’s manifest need to monitor terrorist organizations such as al Qaeda must be weighted in determining the reasonableness of Government electronic surveillance directed against U.S. citizens overseas.
 - e The scope of the search (lengthy monitoring of telephone calls) was not unreasonable due in part to the Government’s “self-evident need to investigate threats to national security presented by foreign terrorist organizations.” The court concluded that the scope of the electronic surveillance was not overbroad: “While the intrusion on El-Hage’s privacy was great, the need for the government to so intrude was even greater.”
- iii. Search and seizure under foreign law. New case law from the November 24, 2008 *In re Terrorist Bombings* cases:
 - a The Fourth Amendment’s Warrant Clause has no extraterritorial application.
 - b The search of El-Hage’s Nairobi residence with the cooperation of Kenyan law enforcement personnel and under Kenyan law was limited and minimally intrusive.

- c. El-Hage's privacy interests give way to the Government's manifest need to monitor the activities of al Qaeda with which El-Hage was identified by U.S. intelligence officers.
 - d. The search of El-Hage's Nairobi residence under the circumstances was reasonable.
- (3) Evidence exchanges – Mutual Legal Assistance Treaties (MLATs). A standard practice based on treaty law that allows foreign courts to certify evidence obtained by foreign LEAs for admission in United States courts.
- h. Managing sensitive information. Cooperative law enforcement activities in foreign nations often lead to the problem of how to handle sensitive information obtained during these cooperative activities. Sensitive information is information that cannot be revealed in discovery or in courtroom testimony or documents because to do so would expose sensitive DEA sources and methods used to collect the information in foreign nations.
 - (1) One way to manage this problem, the tried and true way is to structure the prosecution so as to avoid the need to use the sensitive information.
 - i. Prosecutions in the United States.
 - ii. Prosecutions in foreign courts.

(2) Non Responsive

Non Responsive

- (3) Another way to manage this problem: DEA may classify the information on its own authority or, if DEA has received the information from foreign government sources that request that the information be treated in confidence, DEA will treat it as classified information (this is known as Foreign Government Information or FGI). Either way, once the information is classified, the Classified Information Procedures Act (CIPA) can be used to protect the sources or methods used to obtain the information to the extent permissible under the Constitution.
- i. CIPA cannot constitutionally prevent the disclosure of evidence that is material and relevant to a defense to charges against a criminal defendant.
 - ii. CIPA cannot constitutionally prevent the disclosure of evidence that is exculpatory, that is, *Brady* information.
 - iii. Evidence that a judge decides is useful to counter a government case or helpful to the defendant cannot be withheld from disclosure.
 - iv. However, classified information that fits into neither of the above categories can be protected from discovery by a criminal defendant in accordance with Federal Rule of Criminal Procedure 16(d)(1).
 - v. Permissible and useful CIPA procedures:
 - a *Ex parte* and *in camera* hearings.
 - b Substitutions.
 - c Redactions.
 - d Stipulations.
 - vi. Additional case law from the November 24, 2008 *In re Terrorist Bombings* cases concerning CIPA proceedings:
 - a CIPA allows, even requires, judges to exclude the exposure of classified information to persons who do not have a security clearance. Thus, an *ex parte*

and *in camera* hearing may exclude the defendant without interfering with the defendant's right to be present during crucial stages of his trial or his right to counsel.

- b Judges should consider that, in accordance with FRCP 16(d)(1), they have a duty to consider restricting discovery due to the need of the Government to protect information vital to the national security. Thus, the national security significance of classified information the defendant seeks to discover must be considered by the trial judge under CIPA and FRCP 16(d)(1).

- i. Considerations on the *Early Intervention Dilemma*. The early intervention dilemma is a problem faced by both law enforcement and intelligence agencies. It can best be expressed with the question: "when is the right time to take this investigation down?" What follows are several newspaper articles highlighting recent experiences in cooperative law enforcement/intelligence investigations into suspected terrorist's activities. The dilemma of the right time to take down the investigation has added importance when these two entities work together and especially when terrorists are their target. The last item is a portion of a law review article that further explains the early intervention dilemma.

- (1) London: police kill an innocent person believed to be a suicide bomber.
 - (2) London: police say it could happen again.
 - (3) London: explaining the inexplicable.
 - (4) London: reacting when overtaken by events.
 - (5) England and America: the blame game afterwards.
 - (6) London: preventing airliners from exploding in mid-air.
 - (7) Australia: acting to save lives.
 - (8) DEA acts early to prevent terrorism in Afghanistan
 - (9) The Early Intervention Dilemma: a legal explanation.

C. CONCLUSION.

Domestic drug conspiracies lead to international suspects and defendants. This class has outlined some of the provisions of United States drug law and anti-terrorism law that apply outside the territory of the United States. This class has identified some cooperative investigative activities that can result in the arrest and prosecution of foreign violators of any domestic United States law that has extraterritorial effect.

This class has offered ways to manage DEA sensitive information, which cannot be allowed to be subject to standard discovery rules, so as to protect this information from disclosure in U.S. courts.

Finally, this class has introduced the phenomenon of the Early Intervention Dilemma and outlined some ways in which the decision concerning when to take down the investigation can affect our long term objectives.

SELECTED BIBLIOGRAPHY

1. Controlled Substances Act, 21 U.S.C. §§ 802(6), 802(23), 802(34), 802(35), 952, 953, 955, 959(a)-(c).
2. Maritime Drug Enforcement Act, 46 U.S.C. §§ 70501 – 70503.
3. In re Terrorist Bombings Of U.S. Embassies In East Africa, (Fourth Amendment Challenges) United States v. Mohamed Sadek Odeh et. seq., 2008 U.S. App. LEXIS 24054 (2nd Circuit 2008).
4. In re Terrorist Bombings Of U.S. Embassies In East Africa, (Fifth Amendment Challenges) United States v. Mohamed Sadek Odeh et. seq., 2008 U.S. App. LEXIS 24052.
5. In re Terrorist Bombings Of U.S. Embassies In East Africa, United States v. Mohamed Sadek Odeh et. seq., 2008 U.S. App. LEXIS 24057 (2nd Circuit 2008).

Articles included in Workbook December 2008

1. Daily Mail (London), "We did nothing wrong: Brazilian's mother hears police chief's verdict on her son's fatal shooting," byline: Lucy Ballinger, October 7, 2008.
2. Agence France Presse, "British police could kill again," Brazilian's inquest hears, dateline: London, October 7, 2008.
3. The Journal (Newcastle, UK) "Police Chief Sure Of Threat By Menezes," October 9, 2008.
4. The Press Association Newsfile, "POLICE UNPREPARED FOR FAILED SUICIDE BOMBING, SAYS CHIEF," byline: Tom Morgan, PA, October 8, 2008.
5. The Press Association Newsfile, "CAPITAL'S LANDMARK 'LOCKED DOWN' POST-7/7," byline: Sam marsden, PA Chief Reporter, September 29, 2008.
6. Associated Press Worldstream, "British blame U.S. for too-early terror arrests," byline: David Stringer, Associated Press Writer, September 9, 2008.
7. The Independent (London), "The terrorists who changed air travel forever; HEATHROW BOMB PLOT THE PLOT," byline: Cahal Milmo, September 9, 2008.
8. The Herald Sun (Australia), "Raids all a matter of timing," byline: Keith Moor, September 19, 2008.
9. PR Newsire Association LLC, "Member of Afghan Taliban Sentence to Life in Prison in Nation's First Conviction on Narco-Terror Charges," US Department of Justice, December 23, 2008.
10. Robert M. Chesney, BEYOND CONSPIRACY? ANTICIPATORY PROSECUTION AND THE CHALLENGE OF UNAFFILIATED TERRORISM, 80 S. Cal. L. Rev. 425, 426-437 (March 2007).

The Early Intervention Dilemma

- a. London: police kill an innocent person believed to be a suicide bomber.**
- b. London: police say it could happen again.**
- c. London: explaining the inexplicable.**
- d. London: reacting when overtaken by events.**
- e. England and America: the blame game afterwards.**
- f. London: preventing airliners from exploding in mid-air.**
- g. Australia: acting to save lives.**
- h. USA: DEA acts to prevent terrorism in Afghanistan.**
- i. The Early Intervention Dilemma: a legal explanation.**

a. London, 2008: the early intervention dilemma; police kill an innocent person they believed to be a suicide bomber.

Copyright 2008 Associated Newspapers Ltd.
All Rights Reserved
Daily Mail (London)

October 7, 2008 Tuesday
1ST Edition

SECTION: Pg. 16

LENGTH: 706 words

HEADLINE: We did nothing wrong,
Brazilian's mother hears police chief's verdict on her son's fatal shooting

BYLINE: Lucy Ballinger

BODY:

THE police chief who gave the order to 'stop' Jean Charles de Menezes declared yesterday: 'We did nothing wrong.' Deputy Assistant Commissioner Cressida Dick told an inquest the innocent Brazilian was the victim of a series of 'unfortunate' coincidences.

The 27-year-old electrician was shot dead on July 22, 2005, by officers who feared he was one of four men who had tried to bomb the Tube the day before.

Miss Dick appeared confident and remained standing to give her evidence, watched by Mr de Menezes's mother and brother who had travelled from Brazil to come face-to-face with her for the first time.

Later, however, the senior officer choked back tears as she said she thought about his death every day.

She described Mr de Menezes as 'the victim of some terrible and extraordinary circumstances'.

'If you ask me whether anybody did anything wrong or unreasonable in the operation, I don't think they did,' she said.

When asked what went wrong, Miss Dick said it was a series of 'unfortunate' coincidences.

Officers followed Mr de Menezes when he left his flat in Tulse Hill, South London - thinking he could be suspect Hussain Osman, who lived in the same block - but were not able to positively identify him.

Miss Dick said: 'One thing that clearly went wrong was that we, as a nation, did not prevent those attacks on July 7, or indeed Hussain Osman and others' attacks on the 21st.

'Mr de Menezes was the victim of some terrible and extraordinary circumstances the day afterwards.

'He was extraordinarily unfortunate to live in the same block as Hussain Osman had been, he was desperately unfortunate to look very like Hussain Osman.' Mr de Menezes was shot seven times in the head as he boarded a train at Stockwell station after Miss Dick gave the order to 'stop' him as he entered the Tube.

She went on to describe how the behaviour of Mr de Menezes had increased her suspicions.

The senior officer, who has been promoted since the shooting, said he was 'jumpy' and sending text messages as officers watched.

'Some of the things Mr de Menezes did in all innocence - the way he came off the bus and on the bus - contributed to my assessment of him as a bomber from the day before, and someone who might be intent on causing an explosion today. And finally he had the great misfortune of entering the same station that three of the bombers entered the day before.

'So lots of things happened, any one of those you might describe as going wrong,' she said.

As she took to the stand, the dead man's brother Giovanni, 36, kept a reassuring hand on the shoulder of his 63-year-old mother Maria Otone de Menezes.

But as Miss Dick described the moments leading up to Mr de Menezes' death, his mother had to be escorted from the room in floods of tears.

The Deputy Assistant Commissioner also became tearful as she described her dismay when she was told an innocent man had died.

'It's a terrible thing to happen and from that day to this, I have thought about this every day, and wondered what we could have done differently,' said Miss Dick.

She denied giving an order that Mr de Menezes must be stopped from getting on a train 'at all costs' or instructing the firearms teams to use lethal force to stop him.

'I would need to be absolutely satisfied that this person posed a dreadful imminent threat before I would order a critical shot,' said Miss Dick.

'I was asking for what you might call a conventional challenge from the firearms officers.' The inquest also heard that she went to the wrong room and missed the start of an important meeting of senior officers on the morning of the shooting.

Her insistence that it was circumstances rather than human error which lead to the shooting is in contrast to evidence last week.

Then, her commanding officer Deputy Assistant Commissioner John McDowall admitted that, among other things, 'mistaken identification' was 'instrumental'.

The de Menezes family was 'very disappointed and upset' by Miss Dick's evidence said the Justice4Jean campaign outside the hearing.

Spokesman Yasmin Khan added: 'Repeatedly police officers are deflecting the blame and saying they did nothing wrong, and it is offensive and inappropriate.' The inquest at the Oval cricket ground, South London, is scheduled to last 12 weeks.

LOAD-DATE: October 7, 2008

b. London, 2008: the early intervention dilemma; police say it could happen again in similar circumstances; now the shooters have a dilemma, don't they?

Copyright 2008 Agence France Presse
All Rights Reserved



Agence France Presse -- English

October 7, 2008 Tuesday 5:08 PM GMT

LENGTH: 323 words

HEADLINE: British police could kill again, Brazilian's inquest hears

DATELINE: LONDON, Oct 7 2008

BODY:

British police could shoot dead another innocent person because of the "high risk" of anti-terror operations, a police commander said Tuesday, at the inquest into the shock killing of an innocent Brazilian.

Cressida Dick, deputy assistant commissioner of London's Metropolitan Police, told the inquest into the police shooting of the innocent Jean Charles de Menezes that police always attempted to reduce the risk to the public.

But she admitted the risk could be minimised by a "less than perfect extent" when suspected suicide bombers were on the run, making possible a recurrence of the events that led to the shooting of de Menezes.

De Menezes, 27, was shot seven times in the head at Stockwell Tube station in south London on July 22, 2005 after being mistaken for Hussain Osman, who had unsuccessfully tried to detonate a suicide bomb in a train the day before.

Dick was in charge of the control room coordinating the pursuit of the Brazilian electrician by surveillance and firearms officers who mistook him for Osman.

Watched by the victim's mother Maria Otone in the court, Dick was asked by the family's lawyer Michael Mansfield if the fatal shooting was a one-off.

She said: "I'm afraid, sir, I do believe that this or something like this could happen again.

"The nature of these operations is that they are incredibly high risk to all concerned.

"And that is because of the nature of the threat that we face from suicide terrorists, and the difficulty that there is in dealing with such a threat and the very fast timescale in which these things can happen.

"Our job is to reduce the risk to everybody as best as we possibly can all the time... but I do fear that in the future a bomber might not be prevented from setting a bomb, and there would be a huge scrutiny of why we did not manage to prevent that.

"Our job is to minimise the risks. Given the huge scale of the risks, we may only be able to do that to a less than perfect extent."

LOAD-DATE: October 8, 2008

c. London, 2008: the early intervention dilemma; follow up stories on the killing of an innocent person; explaining what to the public is inexplicable.

Copyright 2008 Newcastle Chronicle & Journal Ltd.
All Rights Reserved
The Journal (Newcastle, UK)

October 9, 2008 Thursday

SECTION: Pg. 18

LENGTH: 386 words

HEADLINE: Police Chief Sure Of Threat By Menezes

BODY:

THE police chief directing operations which led to Jean Charles de Menezes's shooting admitted yesterday that her officers were not prepared for a failed suicide bombing.

Deputy Assistant Commissioner Cressida Dick said she believed Mr de Menezes posed a great threat as officers pursued him on July 22, 2005.

But she told his inquest that nobody anticipated having to search for a failed suicide bomber before a manhunt was launched after an attack on London the previous day.

Explaining how officers had been training for potential attacks since the 9/11 atrocity in New York, she said: "I do not think anybody was anticipating finding a failed suicide bomber.

"Before July 2005, we had not had any attack by a suicide bomber, as you know, and we had not had any attack from what you might now call international terrorism."

Responding to questioning about whether the Metropolitan Police could ensure the safety of the intended victims of terrorists, she told the inquest at the Oval cricket ground, south London: "Sadly, I cannot guarantee that, sir."

Ms Dick later spoke of her regret at accelerating the investigation from green to red.

She said: "On this occasion nobody ordered amber. This is something I feel, in retrospect, could have been discussed before with my silver commander."

Mr de Menezes, 27, was killed by specialist firearms officers who mistook him for failed suicide bomber Hussain Osman after he boarded a train at Stockwell Tube station on July 22 2005.

Ms Dick's log recording events on the day of Mr de Menezes's death was not 100% accurate, it emerged later.

PC Peter Cremin, who was drafted in to take notes from her as the situation unfolded, told the inquest: "I was not able to record everything. I did my best to record what I thought and what I was told were important things to record."

Ms Dick was in charge of the Scotland Yard control room overseeing the pursuit of the Brazilian.

On her final day of evidence she told the inquest said she had no doubt Mr de Menezes posed a threat.

She said surveillance messages were misinterpreted in events leading up to the Brazilian electrician's death.

But when Ian Stern, representing firearms officers, asked if she was satisfied that the suspect represented a real and immediate threat and was intent on causing that explosion, she replied: "Yes, sir."

LOAD-DATE: October 9, 2008

Copyright 2008 The Press Association Limited
All Rights Reserved
Press Association Newsfile

October 8, 2008 Wednesday 4:33 PM BST

SECTION: HOME NEWS

LENGTH: 544 words

HEADLINE: POLICE UNPREPARED FOR FAILED SUICIDE BOMBING, SAYS CHIEF

BYLINE: Tom Morgan, PA

BODY:

The police chief directing operations which led to Jean Charles de Menezes's shooting admitted today that her officers were not prepared for a failed suicide bombing.

Deputy Assistant Commissioner Cressida Dick said she believed Mr de Menezes posed a "great threat" as officers pursued him on July 22 2005.

But she told his inquest nobody anticipated having to search for a failed suicide bomber before a manhunt was launched after an attack on London the previous day.

Explaining how officers had been training for potential attacks since the 9/11 atrocity in New York, she said: "I do not think anybody was anticipating finding a failed suicide bomber.

"Looking for a failed suicide bomber was not something we had really thought about.

"Before July 2005, we had not had any attack by a suicide bomber, as you know, and we had not had any attack from what you might now call international terrorism."

Responding to questioning about whether the Metropolitan Police could ensure the safety of the intended victims of terrorists, she told the inquest at the Oval cricket ground, south London: "Sadly, I cannot guarantee that, sir."

Ms Dick later spoke of her regret at accelerating the investigation from "green" to "red".

She said: "On this occasion nobody ordered 'amber'. This is something I feel, in retrospect, could have been discussed before with my silver commander."

Mr de Menezes, 27, was killed by specialist firearms officers who mistook him for failed suicide bomber Hussain Osman after boarding a train at Stockwell Tube station on July 22 2005.

Ms Dick's log recording events on the day of Mr de Menezes' death were "not 100% accurate", it emerged later.

PC Peter Cremin, who was drafted in to take notes from her as the situation unfolded, told the inquest: "I was not able to record everything.

"I did my best to record what I thought and what I was told were important things to record."

Ms Dick, who faced more than two-and-a-half days of questioning, was in charge of the Scotland Yard control room overseeing the pursuit of the Brazilian.

On her final day of evidence she told the inquest said she had "no doubt" Mr de Menezes posed a threat.

She said surveillance messages were "misinterpreted" in events leading up to the Brazilian electrician's death.

But when Ian Stern QC, representing firearms officers, asked if she was "satisfied that the suspect represented a real and immediate threat" and was "intent on causing that explosion", she replied: "Yes, sir."

She said it was too dangerous to challenge Mr de Menezes while he was still on the bus and told the jury she believed the Metropolitan Police was an "extremely competent organisation - particularly in crisis".

She added: "I am in a senior rank, I am paid, relatively, a lot of money to take responsibility and that's what I tried to do.

"I had trained a lot and understood about covert operations where there is a threat-to-life situation. Not all my commander colleagues would perhaps say the same.

"I certainly do not spend time worrying about questions I might have asked."

The inquest at the Oval cricket ground, which is expected to last 12 weeks, was adjourned until tomorrow.

Three anonymous officers - named as Brian, Bernard and Nick - are due to give evidence.

LOAD-DATE: October 9, 2008

d. London, 2008: Government actors react when they are overtaken by events; lock down London's landmarks and then what?

Copyright 2008 The Press Association Limited
All Rights Reserved
Press Association Newsfile

September 29, 2008 Monday 3:57 PM BST

HEADLINE: CAPITAL'S LANDMARKS 'LOCKED DOWN' POST-7/7

BYLINE: Sam Marsden, PA Chief Reporter

BODY:

Fear of further attacks after the 7/7 London bombings was so great that Buckingham Palace, Parliament and New Scotland Yard were all completely locked down at one point, an inquest heard today.

Peter Clarke, head of the Metropolitan Police's anti-terrorist command at the time, confirmed that no-one was allowed to leave any of the landmark buildings for an hour-and-a-half on July 12 2005.

This followed the discovery that day of the terrorists' "bomb factory" in Leeds and their abandoned car at Luton railway station.

Giving evidence at the inquest into Jean Charles de Menezes's death, Mr Clarke spoke of the "unprecedented" pressure on police after the July 7 2005 suicide attacks and the failed bombings a fortnight later.

In a personal account he also revealed that he was away from London at the time of Mr de Menezes's death supporting his wife, who was still deeply affected after their teenage son narrowly escaped being caught up in the 7/7 atrocities.

The innocent 27-year-old Brazilian Jean Charles de Menezes was killed at Stockwell Tube station in south London on July 22 2005 by specialist firearms officers who mistook him for failed suicide bomber Hussain Osman.

Mr Clarke, who retired as Scotland Yard's Assistant Commissioner Specialist Operations this year, was questioned about the decision to "lock down" potential terrorist landmarks on July 12.

Richard Horwell QC, for the Commissioner of the Metropolitan Police, said: "That meant that no-one could enter New Scotland Yard or Parliament and no-one could leave."

Mr Clarke replied: "That's absolutely right. In fact it included Buckingham Palace as well."

The former anti-terror chief went on: "It was completely unprecedented, as was some of the decision-making having to be made at that time about whether to warn the public about the possibility of a suicide bomber being on the loose or not."

"I remember those as being some of the most difficult decisions that one had ever confronted.

"If we warned the public, we could cause unnecessary panic. If we didn't and something terrible happened, the obvious question is: why didn't you warn the public?

"That is the sort of pressure we were working under day in, day out. July 12 is but one example."

Mr Clarke explained why he left London on the morning of July 21 2005, before the second series of attacks on the capital's public transport network.

The anti-terror chief told the inquest that on July 7 2005 his 16-year-old son was passing through King's Cross station in London bound for Cambridge.

He arrived moments after suicide bomber Germaine Lindsay detonated his explosive device on a Piccadilly Line train that had just left King's Cross.

The teenager telephoned his father to say he could not get into the station and had seen smoke and people running around.

Mr Clarke said: "I hadn't heard by that stage - it was just before 9am - that this was a terrorist attack but from what he was telling me, I had my suspicions about what it could be.

"So I gave him the instructions to get away from there as quickly as possible.

"And in fact we, my wife and I, then told him to get on a bus to get away."

Less than an hour later bomber Hasib Hussain set off a bomb on a Number 30 bus in Tavistock Square, near King's Cross.

Mr Clarke told the inquest he and his wife were unable to contact their son for some time after this.

He said: "For me, I was in the centre of things so perhaps it wasn't so difficult. But for my wife it was extraordinarily difficult.

"Our holiday had been due to begin a day or two after that. I told my family to go on holiday and obviously I wouldn't be able to join them.

"So they went, but by about July 20 my wife was very anxious, and possibly suffering a bit of delayed shock from what had happened on the 7th."

Mr Clarke joined his family on holiday on July 21 but flew back to London the next day after learning Mr Menezes had been shot dead.

Speaking of the period after the two sets of attacks, the former anti-terror chief said: "There was a strange atmosphere.

"Like most of my colleagues, I didn't go home very much in that period after July 7, and one could sense it in the evenings walking around or going out.

"There was a sense in the air that this has happened, could it happen again, is it likely to happen again?"

Michael Mansfield QC, for the Menezes family, pointed out that London also experienced simultaneous multiple bombings during the Troubles in Northern Ireland.

Mr Clarke, who took over as head of Scotland Yard's anti-terrorist branch in May 2002, replied: "I think there is a danger here, sir, of comparing chalk and cheese.

"That Irish terrorist campaign was of an entirely different nature to the campaign that we have been facing in this country for the past six or seven years.

"There are some fundamental differences, which demand different responses, different structures and a different mindset to the prevention and detection of the attacks."

He continued: "The threat that we have seen from the Islamist groupings is global in its origins and every investigation seems to take us across the world.

"We have seen the use of suicide as a regular feature both here and overseas.

"There have been no warnings given and there has been no determination or will to restrict casualties.

"On the contrary, in investigation after investigation we have seen that the ambition of the terrorists is simply to kill as many people as possible."

Mr Clarke also spoke of the tactics developed by the Met to tackle on-the-run suicide bombers after Spanish police officers were killed while trying to arrest those responsible for the 2004 Madrid bombings.

These included a briefing document warning patrolling officers to look out for people sweating, mumbling or praying and wearing bulky clothes not suitable for the weather.

Mr Clarke told the inquest: "Recent experience, not only with Madrid, but also with the Netherlands in October 2003, shows us that the current groupings of terrorists when cornered tend to either fight back or to kill themselves and try to kill others in the process."

The sixth day of the 12-week inquest also heard that the Met's CO19 specialist firearms officers - two of whom fired the fatal shots to Mr de Menezes's head at point blank range - were not "gung-ho".

A senior Scotland Yard firearms tactical adviser, identified only as Andrew, said there was a "considerable culture of constraint" among the teams of highly-trained marksmen.

He added: "For me there probably is no more demanding or rewarding work than firearms and being a specialist firearms officer.

"We are certainly not looking for officers who are gung-ho, for want of a better expression."

Andrew also revealed that he had never fired at anyone in his long career as a firearms specialist.

Ian Stern QC, representing the armed police who shot Mr de Menezes, told the inquest specialist firearms officers were deployed between 600 and 1,000 times a year.

Between 2001 and 2005 there were only five operations in which shots were fired, causing a total of four deaths, he said.

The jury was sent home until tomorrow.

LOAD-DATE: September 30, 2008

e. London, 2008: after an unsatisfactory trial, LEA/IC authorities, who cooperated to investigate and prevent the attack, blame each other for the failure to convict all of the plotters.

Copyright 2008 Associated Press
All Rights Reserved
Associated Press Worldstream

September 9, 2008 Tuesday 4:57 PM GMT

SECTION: INTERNATIONAL NEWS

LENGTH: 885 words

HEADLINE: British blame U.S. for too-early terror arrests

BYLINE: By DAVID STRINGER, Associated Press Writer

DATELINE: LONDON

BODY:

Reeriminations flew across the Atlantic on Tuesday, a day after London jury failed to convict eight men of an alleged plot to bomb trans-Atlantic airlines. British police said U.S. officials pressed them to arrest the men too soon, weakening the court case against the suspects.

The top U.S. homeland security official denied the claim, saying everyone was "on the same page" about the timing of the arrests.

Investigators said a decision to prematurely arrest suspects in August 2006 came after U.S. officials pressed for one of the men's alleged accomplices to be arrested in Pakistan.

Britain felt the man's arrest in Pakistan could have tipped off the other suspects, so police arrested the men before enough compelling evidence was gathered, according to a senior police official, who requested anonymity to discuss the case.

One key question is whether the jury would have found suspects guilty if British investigators had been able to observe a planned dummy run of the airline plot, which police said would have involved a suspect attempting to pass through airport security with an explosive-laden drink bottle.

The police official said the suspects were arrested two days before the trial run was to take place on Aug. 12, 2006. Both police and Britain's MI5 domestic intelligence service had wanted to continue monitoring the alleged plotters, said a British security official, who requested anonymity to discuss details.

The jury on Monday found three men guilty of conspiring to murder using homemade liquid explosive bombs but not necessarily aboard airliners.

Jurors couldn't reach verdicts on four others, and a fifth man accused of being a key link between the U.K. and al-Qaida was acquitted of all charges.

Prosecutors will decide Wednesday whether to seek a retrial.

Peter Clarke, the now retired ex-head of British counterterrorism policing and in charge of the inquiry at the time, said the arrest in Pakistan prompted panic in London among investigators who felt they were close to delivering a solid court case.

"This was not good news. We were at a critical point in building our case against them," Clarke wrote Tuesday in The Times of London.

British authorities worried the Pakistan arrest of Rashid Rauf, a British-born alleged contact of the plotters, could send the men into hiding or trigger a desperate snap attack.

"Clearly, the British security services had to take action more quickly than they wanted to," said Conservative Party lawmaker Patrick Mercer, a former military intelligence officer. "There wasn't as much evidence gathered as people would have wanted."

British security officials and police said as many as five other would-be suicide bombers, who would have been drafted into the plot in its final days, may have evaded arrest as a result of the early arrests.

The men allegedly planned to assemble their bombs in the airliner toilets. The bombs were to be made of liquid explosives injected into soda bottles and set off by detonators hidden in disposable cameras.

The alleged plot when uncovered ground airports to a standstill in August 2006.

U.S. Homeland Security Secretary Michael Chertoff insisted Tuesday that Britain and the United States had been in agreement on the arrests.

"We were very much on the same page about the timing," he told The Associated Press in Washington.

"I understand that the prosecutors always feel that they want to wait and get as much evidence as they can. I've also seen cases, unfortunately, where waiting too long has resulted in a plot actually occurring and people dying," he said.

Chertoff said cooperation between Britain and the United States had allowed officials "to prevent and disrupt a plot that, had it come to fruition, would have been just comparable to 9/11."

"It's easy, having averted the danger, now in retrospect to say, 'Oh, we could have cut it a little bit closer.' That may make for good entertainment television. It's a very irresponsible way to protect the citizens of both countries," he said.

The jury's decision has dealt a blow to Britain's counterterrorism efforts, coming weeks after another jury failed to reach verdicts over three alleged accomplices of the July 2005 London suicide bombers, who killed 52 commuters during rush hour.

Four other trials connected to the airliner case are also in jeopardy following Monday's verdicts.

In the airliner trial, prosecutor Peter Wright acknowledged the group hadn't produced a viable bomb although experiments had taken place at a London row house where shelves were packed with explosives, chemicals and equipment.

Wright also conceded no specific date had been selected to carry out the attacks.

But British security officials and police who were monitoring the group via surveillance, bugs and wiretaps insist the cell planned to strike within days of their arrests. A lack of evidence meant that allegation was never aired in court.

Bob Ayers, a former U.S. intelligence officer, said a key problem for Britain was that wiretaps and intercepts key tools in counterterrorism investigations are not used as evidence in British courts.

Intelligence officials have long objected to using the material as evidence, fearing their methods could be compromised.

Associated Press Writers Eileen Sullivan, Lara Jakes Jordan and Pamela Hess in Washington, contributed to this report

LOAD-DATE: September 10, 2008

*f. London, 2008: trial of suicide plotters to bomb
airliners; not all of the accused plotters are convicted
by the jury; was the intervention too early?*

Copyright 2008 Newspaper Publishing PLC
All Rights Reserved
The Independent (London)

September 9, 2008 Tuesday
First Edition

SECTION: NEWS; Pg. 2

LENGTH: 1522 words

HEADLINE: The terrorists who changed air travel forever;
HEATHROW BOMB PLOT THE PLOT

BYLINE: Cahal Milmo

BODY:

THE INTERNET cafe where Abdulla Ahmed Ali sat down shortly before midday on 6 August 2006 was much like any of the hundreds of small communications shops that dot north-east London. T&I Telecom in Walthamstow offered the usual range of mobile phone top-up cards, cheap international calls and handsets along with a row of pay-as-you-go internet terminals.

What set the shop apart that day was the presence alongside Ali, 27, of an undercover police officer who watched as his target went to the timetable page of the American Airlines website and began to highlight flight numbers. They were all heading from Heathrow to North America.

The information being collated by Ali was just one piece in a jigsaw of evidence that a plot led by the British-born Pakistani was moving rapidly towards its "execution phase". Equipped with technology bought from corner shops, a Welsh hairdressing wholesaler and an electrical store in Pakistan, a group of eight men - all young radicalised British Muslims - had carefully brought together a mission to cause death and destruction with homemade liquid explosives.

Ali would later admit to a plan to use liquid bombs concealed inside 500ml bottles of Oasis and Lucozade to target Terminal 3 at Heathrow. But police were concerned that an even more spectacular attack was being finalised: a suicide attack to blow up at least seven - and as many as 18 - transatlantic airliners.

When the order came from within the British Government to arrest the gang late on 9 August, they were "just days" from launching the attack, according to police sources. One member of the cell was supposedly due to perform a "dummy run" within 72 hours to test airport

security and surveillance tapes suggested that up to three more cells may have been involved in the plot, providing up to 10 more bombers.

It was a sophisticated and well-financed conspiracy which was first mooted in detail at least a year earlier in Pakistan by senior extremists with links to al-Qa'ida and was played out in internet cafes, in phone calls from kiosks using untraceable phone cards and late night meetings on street corners. At its centre was a two-bedroom flat on Forest Road, Walthamstow, bought for £138,000 in cash in July 2006 to act as a bomb factory.

From an Indian restaurant delivery driver to a former shop assistant, the plotters were a mixture of schoolfriends and acquaintances from the refugee camps of Pakistan who had honed their skills in bomb-making and had their resolve to become "shahid" or martyrs strengthened at extremist training camps in Pakistan over a period of at least four years.

The mission that Ali referred to as his "blessed operation" was brought together during a period of four months between April and early August 2006, rapidly reaching a peak of activity in its final three weeks.

Within hours of his visit to T&I Telecom, Ali met up with the second most important figure in the plot, Assad Ali Sarwar, the 28-year-old "quartermaster" and chief target scout of the terrorist cell, who was based in High Wycombe, Buckinghamshire.

They met up with Mohammed Gulzar, a failed computer studies undergraduate, who prosecutors claimed had flown into Britain from South Africa to act as "supervisor" for the final stages of the plot. He was yesterday cleared by jurors of all charges. Counter-terrorism sources claimed it was a measure of the "operational security" kept by the leaders that they chose to meet on a Walthamstow street corner where surveillance officers were unable to effectively eavesdrop. Within 72 hours of that meeting, the men were in custody, along with their fellow alleged conspirators.

Ali and Sarwar were arrested as they sat on a wall outside Waltham Forest Town Hall in north-east London at about 9.30pm on 9 August during a rendezvous set up by phone calls using untraceable calling cards.

When officers asked Sarwar, who had begun buying the supplies to make the liquid devices in April, if he had anything dangerous in his car - a red Nissan Primera - he had the chutzpah to reply: "Only the handbrake."

In reality, the contents of the quartermaster's car boot - and the pockets of his comrade - were considerably more sinister. In the boot were two of the six "suicide" videos recorded by the would-be bombers.

One of the two videos had been recorded hours earlier by Umar Islam, 30, aka Brian Young, a former postman and Rastafarian from High Wycombe who converted to Islam in 2001, in the Forest Road flat under Ali's direction and overheard by police. Islam said: "This is revenge for the actions of the US in the Muslim lands and their accomplices such as the British and the Jews."

Ultimately, the jury were unable to decide whether the "martyrdom" videos made by Islam and two other defendants were genuine or, as they claimed, were fake recordings for a documentary being made by Ali.

When police searched the jacket pockets of Ali, they found a computer "thumb drive" or memory stick containing details of seven flights out of Heathrow to North America along similar lines to the data he had been collating at T&I Telecom shop along with information about hand luggage rules at BAA airports. In the opposite pocket was a diary, which contained such a treasure of information that prosecutors at Woolwich Crown Court described it as a "blue-print" for the attacks.

Ali and Sarwar were careful to ensure members of the cell did not all meet each other until the plot was ready to be carried out.

Among the notes discovered in Ali's diary were: "select date, five days before jet. all link up"; "calculate exact drops of tang"; "decide on which battery to use for D"; "one drink use, other keep in pocket, maybe will not get through machine"; and "dirty mag to distract".

The flights identified by Ali, who holds a computer engineering degree, were all scheduled to depart within two-and-a-half hours of each other from Terminal 3 to six cities in North America. Police believe they were chosen because they would provide a six-hour window in which all the flights would be airborne and vulnerable to a simultaneous attack. The jets were operated by Air Canada, United Airlines and American Airlines - and involved Boeing 777, 767 or 763 jets capable of carrying between 241 and 285 people.

Diary pages in Ali's spidery handwriting gave details of how the gang expected to smuggle the bombs on to the aircraft, using pornography and condoms to divert attention from their carriers' intent and the devices.

At the heart of the plot was a modus operandi that had never been seen before by counter-terrorism forces around the world. Using hydrogen peroxide bought by Sarwar in April and July using the false name of Jona Lewis from a hairdressing supply store in Carmarthen, South Wales, the men planned to inject a liquid explosive charge into the bottom of empty 500ml bottles of Lucozade or Oasis drinks.

The charge, a mixture of concentrated hydrogen peroxide - prepared by Sarwar with such precision that he could recite the formula by heart - and a powdered soft drink called Tang - was to be squirted through the plastic nodule at the bottom of each bottle and the hole concealed with superglue.

Footage from a concealed camera placed inside Forest Road recorded Ali drilling holes in the bottom of the drink bottles.

Another defendant, Tanvir Hussain, was put in charge of making a powerful explosive, HMTD, to be placed in detonators fashioned from hollowed-out Toshiba batteries which had been bought especially for the purpose in Pakistan. The hole at the bottom was to be concealed with black foam.

In his role as the head of logistics, Sarwar was responsible for gathering the equipment needed to make the HMTD. He placed the materials in a suitcase and buried them in woodland close to his home.

The group claimed the devices, along with their suicide videos, were part of a plan for a publicity campaign that would have involved setting off a "big bang" in the Houses of Parliament, later changed to Heathrow's Terminal 3, and the release of a spoof documentary containing the videos.

But experts declared the liquid bombs "highly viable", stating it was likely the devices would be set off with a power source such as the flash from a disposable camera and the resulting blast could have been powerful enough to rip a hole in the pressurised fuselage of a jet flying at a cruising altitude of 35,000ft.

One senior investigating officer told The Independent: "It was a clever and dastardly plot. We hadn't seen the like of it before. They had found a sophisticated way of concealing a device and we don't know if airport security would have been able to spot it."

By failing to convict Ali, Sarwar and Hussain of conspiring to target aircraft, the jury decided there was insufficient proof that downing airliners had been the finalised target of the plot.

Unknown to the plotters, every move had been watched by Scotland Yard's counter-terrorism command and MI5 from late April 2006 in the largest surveillance operation carried out in Britain, involving 200 specialist plain clothes officers drafted in from forces around the country.

LOAD-DATE: September 8, 2008

*g. Australia, 2008: the early intervention dilemma;
whether to act to save lives or to hold back and further
the investigation; officials in Australia make the call.*

Copyright 2008 Nationwide News Pty Limited
All Rights Reserved
Herald Sun (Australia)

September 17, 2008 Wednesday
1 - FIRST Edition

SECTION: NEWS; Pg. 4

LENGTH: 595 words

HEADLINE: Raids all a matter of timing

BYLINE: Keith Moor

BODY:

INVESTIGATORS lived in constant fear of Abdul Benhrika and his radical Muslim network blowing something up.

They had to weigh up the ramifications of making arrests too early and jeopardising the prosecution, and going in too late and risking a terror attack.

Australian Federal Police Commissioner Mick Keelty said saving lives was more important than securing convictions.

"The difficulty with these sorts of cases is that when an alleged conspiracy starts it can obviously end with the committing of the actual substantive act," he said.

"That conspiracy stage can go on for years until something is triggered in the mind of one of the participants that the time is right to do something.

"It's very difficult to pinpoint how close Benbrika's cell was to taking action.

"But clearly, on the evidence that was put forward to the court, we thought they were planning something imminent.

"This is why terrorism matters are so different, because the consequences of getting it wrong are so immense.

"And the expectations from the community are such that they want to be protected and they need to be protected.

"The consequences of getting it wrong are just so dire that you can't afford to get it wrong. So the question is, how long do you allow this to go on?

"If you stop it too early and there is no evidence to prosecute, then you have interrupted but you may not have . . . stopped it.

"I can tell you that most definitely the experience in the UK and in the US is that it is the role of law enforcement to stop these things from happening.

"That is why, in the Benbrika case, with the Commonwealth Director of Public Prosecutions, we briefed the Federal Government and explained what was happening -- but explained the deficiency in the legislation.

"The problem with the legislation was that the legislation at the time talked about 'the' terrorist act.

"And in the Benbrika matter there was no definite decision about 'the' terrorist act but, in our view, clearly they were planning for 'a' terrorist act.

"So we explained that to the previous government and that was when they recalled the Senate and changed the wording of the Act to 'a' terrorist act.

"It ought not to be lost that the key players in this, obviously the prime minister, but also the leader of the Opposition, when presented with what we had, decided to give the change bipartisan support in Parliament."

John Howard spelled out the exact meaning of the amendment in 2005.

"The amendments will clarify that it is not necessary for the prosecution to identify a specific terrorist act," he said.

"It will be sufficient for the prosecution to prove that the particular conduct was related to a terrorist act.

"It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering 'a' terrorist act."

It wasn't until after all the arrests that prosecution witness and convicted terrorist Izzydeen Atik nominated several possible targets to police.

THE VERDICTS

Abdul Nacer Benbrika (48)

Muslim cleric and terror cell leader

GUILTY

Aimen Joud (23)

Benbrika's right hand man

GUILTY

Fadi Sayadi (28)

Benbrika's co-ordinator and consultative committee member.

GUILTY

Ahmed Raad (25)

Cell treasurer and terrorism fundraiser

GUILTY

Ezzit Raad (26)

Involved in car re-birthing racket to raise money for terror cell

GUILTY

Amer Haddara (29)

Stood ready to take over from Benbrika

GUILTY

Abdullah Merhi (23)

Would-be suicide bomber who discussed attacking Melbourne's rail network

GUILTY

NOT GUILTY

Hany Taha (33)

Bassam Raad (27)

Majed Raad (24)

Shoue Hammoud (28)

NO VERDICT

Shane Kent (31)

LOAD-DATE: September 16, 2008

*h. DEA acts early to prevent terrorism in
Afghanistan (one of the uses of 21 U.S.C. § 960a).*

Copyright 2008 PR Newswire Association LLC.
All Rights Reserved.
PR Newswire

December 23, 2008 Tuesday 12:29 AM GMT

LENGTH: 1073 words

HEADLINE: Member of Afghan Taliban Sentenced to Life in Prison in Nation's First Conviction on
Narco-Terror Charges

DATELINE: WASHINGTON Dec. 22

BODY:

WASHINGTON, Dec. 22 /PRNewswire-USNewswire/ -- A member of an Afghan Taliban cell was sentenced today in U.S. District Court for the District of Columbia to two terms of life in prison on drug and narco-terrorism charges, Acting Assistant Attorney General Matthew Friedrich of the Criminal Division announced.

Khan Mohammed, 38, was ordered by U.S. District Judge Colleen Kollar-Kotelly to serve the two life sentences concurrently as well as 60 months of supervised release, served consecutively, for each of the two counts of conviction following the prison term. Mohammed was convicted on May 15, 2008, after a seven-day jury trial on one count of distribution of one kilogram or more of heroin knowing and intending that it be imported into the United States and one count of narco-terrorism, or the distribution of a controlled substance (in this case heroin and opium) in order to provide something of pecuniary value to a person or group that has engaged or is engaging in terrorist activity. The conviction represented the first time a defendant had been convicted in U.S. federal court of narco-terrorism since the statute was enacted in March 2006.

Mohammed, an Afghan national, was arrested on Oct. 29, 2006, near Jalalabad, Nangahar Province, Afghanistan. Mohammed waived extradition and was brought from Afghanistan to the United States in November 2007.

"A violent jihadist and narcotics trafficker, Khan Mohammed sought to kill U.S. soldiers in Afghanistan using rockets," said Acting Assistant Attorney General of the Criminal Division Matthew Friedrich. "Today's life sentences match the gravity of the crimes for which he was convicted."

"The conclusion of Khan Mohammed's prosecution demonstrates DEA's ability and determination to go to the far corners of the world to bring to justice narco-terrorists who seek to harm Americans," said DEA Acting Administrator Michele M. Leonhart. "Today's strong sentence in this groundbreaking case is the result that can be expected by those who support terrorism by trafficking in narcotics."

The evidence at trial established the following:

The investigation began in August 2006 when a concerned Afghan farmer (testifying under the pseudonym "Jaweed") approached Drug Enforcement Administration (DEA) agents through local Afghan law enforcement. He provided them with information that the Taliban in Peshawar, Pakistan, had attempted to recruit him to conduct a rocket attack on the Jalalabad Airfield, a facility used jointly by U.S. and NATO forces in Nangarhar Province, Afghanistan. The Taliban identified their local operations coordinator as Khan Mohammed, who was then a village elder in the Chaprahar District of Nangarhar Province, and with whom Jaweed was familiar.

Jaweed, agreeing to wear a recording device, met with Mohammed, who discussed prior attacks he had committed on government vehicles and facilities, confirmed that he was aware of the plan to attack the airfield, and discussed with Jaweed acquiring rockets and other munitions to conduct attacks on Americans, other Westerners and those Afghans who collaborated with them, stating "{t}he Americans are infidels and Jihad is allowed against them. If we have to fire [the missiles] toward the airport, we will do it and if not the airport, wherever they are stationed we will fire at their base too. I mean we have to use the mines too. God willing, we and you will keep doing our Jihad." Frequently during later conversations, additional references were made by Mohammed concerning the need to obtain rockets, meetings planned with other Taliban members, and the need to eliminate "infidels," a term Mohammed used to identify Americans, British, and other coalition forces, as well as Afghan citizens who assisted them. Evidence introduced at trial also proved that Mohammed previously engaged in similar terrorist rocket attacks against Afghan government targets.

During their initial interviews of Jaweed, the DEA agents were told that Mohammed had previously been involved in opium and heroin trafficking. This was later confirmed by Mohammed during several recorded conversations. Over this series of recorded conversations, Mohammed agreed to act as a broker for the purchase of opium, selecting the opium seller and negotiating on Jaweed's behalf.

In mid-September 2006, Mohammed accompanied Jaweed to an opium dealer's house, where, on videotape shown at trial, Mohammed was seen inspecting opium, handling negotiations and assisting Jaweed in the purchase of 11 kilograms. On later learning that the opium was intended for conversion into heroin to be imported into the United States, Mohammed replied, "[G]ood, may God turn all the infidels to dead corpses."

After purchasing the opium, Mohammed expressed his willingness to also sell heroin, particularly since it would be going to the United States. As Mohammed stated at various times, "Jihad would be performed since they send it to America," and "[m]ay God eliminate them right now, and we will eliminate them too. Whether it is by opium or by shooting, this is our common goal..." At the request of the DEA, Jaweed approached Mohammed to purchase heroin. On Oct. 18, 2006, Mohammed was seen on videotape shown at trial, in the presence of his four-year-old son, distributing two kilograms of heroin to Jaweed.

According to the evidence presented at trial, the Taliban are an ultraconservative, Islamic militia that has continued to mount an insurgency against the Afghan government since it was removed from power in Afghanistan by Coalition forces in late 2001. According to court documents, as early as 1999, when the Taliban controlled much of Afghanistan, the United States recognized that they were facilitators of terrorism. DEA agents testified at trial that the Taliban has taken on a central role in every stage of opium/heroin production and transportation, relying on it as a principal source of funding for its activities. One agent testified that more than 50 percent of DEA cases have a definitive Taliban dimension.

The case was prosecuted by Trial Attorney Matthew Stiglitz, Deputy Chief for Litigation Julius Rothstein and paralegal Arianne Tice from the Criminal Division's Narcotic and Dangerous Drug Section. The investigation was led by the DEA, in close cooperation with Afghan law enforcement.

CONTACT: U.S. Department of Justice, +1-202-514-2007, TDD
+1-202-514-1888

Web Site: <http://www.usdoj.gov/>

SOURCE U.S. Department of Justice

URL: <http://www.prnewswire.com>

LOAD-DATE: December 23, 2008

i. A legal explanation.

Copyright (c) 2007 University of Southern California
Southern California Law Review

March, 2007

80 S. Cal. L. Rev. 425

ARTICLE: BEYOND CONSPIRACY? ANTICIPATORY PROSECUTION AND THE CHALLENGE OF UNAFFILIATED TERRORISM

NAME: ROBERT M. CHESNEY *

BIO: * Associate Professor of Law, Wake Forest University School of Law; J.D., Harvard University.

I. INTRODUCTION

There is a continuum that runs from contemplation to completion of a criminal act. Precisely how early along that continuum does federal criminal liability attach in circumstances involving potential acts of terrorism?

The significance of this question became apparent during the summer of 2006 in the wake of a string of arrests in terrorism-related cases both at home and abroad. The first set of arrests came in Toronto in early June, when approximately seventeen men were taken into custody by the Royal Canadian Mounted Police on charges that they had acquired three tons of ammonium nitrate and were planning to bomb a variety of targets in Ottawa.ⁿ² Eventually, two U.S. citizens also were arrested in connection with this group.ⁿ³ Meanwhile, in late June, local and federal agents in Miami arrested the head of an obscure religious sect known as the Sons of David, along with six followers, on charges that they were conspiring to carry out a bombing campaign, possibly to include the Sears Tower in Chicago.ⁿ⁴ Two weeks later, the press reported that officials in Lebanon and elsewhere had arrested participants involved in a plot to destroy the Holland Tunnel, which runs under the Hudson River between New Jersey and New York City.ⁿ⁵

In each of these cases, U.S. government officials have gone out of their way to calm the public by emphasizing that the plots were disrupted at a preliminary stage. Speaking of the Miami arrests, for example, Federal Bureau of Investigation ("FBI") Deputy Director John Pistole observed that the plot was "more aspirational than operational."ⁿ⁶ But the early nature of prosecutorial intervention in these and other terrorism-related cases has not been welcomed in every quarter. The prospect that the government has adopted a policy of prosecuting suspected terrorists at the earliest available opportunity has generated criticism from both the civil liberties and national security perspectives, with the former contending that we risk prosecuting dissenting thought uncoupled from culpable action and the latter contending that such a policy would sacrifice the benefits of additional intelligence and evidence gathering.



II. FRAMING THE EARLY INTERVENTION DEBATE

A. A Preference for Intervention at the Earliest Stage?

It has been clear for some time that the Department of Justice ("DOJ") has made the prevention of terrorist attacks a top strategic priority, and thus will intervene before an attack occurs whenever it is possible to do so. n8 What is less clear is whether there is a policy - formal or otherwise - concerning the most desirable point of intervention in the ex ante scenario. Should suspects be arrested and indictments unsealed at the earliest possible opportunity? Should prosecutors instead be encouraged to delay intervention as long as possible in order to maximize the collection of intelligence and evidence? Should the issue of timing be left to the discretion of the officials involved, to be resolved on an ad hoc basis?

It seems highly unlikely that there is any rigid policy purporting to determine, in an across-the-board fashion, the proper timing for prosecutorial intervention. Indeed, such an approach presumably would be resisted by other significant stakeholders in the interagency process relating to terrorism policy, including among others the director of national intelligence, the director of the Central Intelligence Agency ("CIA"), and perhaps even the secretary of defense. n9 Nevertheless, the events of the [*430] summer of 2006 suggest that there is at least a presumption in favor of maximizing early intervention in terrorism cases.

In an address to the American Enterprise Institute in May 2006 that foreshadowed the series of arrests that would soon follow, Deputy Attorney General Paul McNulty advocated an aggressive approach to anticipatory prosecution. n10 "On every level," McNulty said, "we [are] committed to a new strategy of prevention. The 9/11 attacks shifted the law enforcement paradigm from one of predominantly reaction to one of proactive prevention." n11 Under this paradigm, the DOJ does not "wait for an attack or an imminent threat of an attack to investigate or prosecute," but instead does "everything in its power to identify risks to our Nation's security at the earliest stage possible and to respond with forward-leaning - preventative - prosecutions." n12 Citing several post-9/11 prosecutions in which the government had intervened at a relatively early stage, McNulty elaborated that we could await further action by these men and then arrest and prosecute them. Or we could prosecute at the moment our investigation reveals both a risk to our national security and a violation of our Nation's laws. In the wake of September 11, this aggressive, proactive, and preventative course is the only acceptable response. n13



We swoop in as early as possible because experience shows - and I think London is a great example - that the distance between planning and actually operational activity is a very short distance. And anybody who thinks they have time to wait and see how things play out, I think is really taking a foolish approach to the issue of security. n14

The most recent and significant statements on this subject have come from Attorney General Alberto Gonzales, in the wake of arrests in London in mid-August 2006 that apparently disrupted a plot to detonate liquid explosives on board a number of transatlantic flights. n15 In a speech at the World Affairs Council of Pittsburgh, n16 the Attorney General noted that the key question for preventive prosecution is "when to arrest and begin prosecution." n17 He observed that ordinarily "we need to gather enough information and evidence during our investigations to ensure a successful prosecution," and that the choice of when to intervene ultimately "must be made on a case-by-case basis by career professionals using their best judgment - keeping in mind that we need to protect sensitive intelligence sources and methods and sometimes rely upon foreign evidence in making a case." n18 Attorney General Gonzales also declared, however, that "we [*432] absolutely cannot wait too long, allowing a plot to develop to its deadly fruition. Let me be clear, preventing the loss of life is our paramount objective. Securing a successful prosecution is not worth the cost of one innocent life." n19

Of course, criminal prosecution is not the only mode of response available to government officials once they have made the decision to intervene to incapacitate a suspected terrorist. n20 But the two most significant alternatives - immigration enforcement and military detention - may be of declining utility in the years to come. Immigration enforcement by definition has no application with respect to citizens, and recent trends indicate that the threat of terrorism at times will emanate from "homegrown" sources rather than aliens in the future. n21 And while military detention has been used on two occasions since 9/11 in circumstances involving suspected terrorists captured in the United States, n22 lingering uncertainty about the legality of that approach, n23 combined with extensive political pressure not to employ it, tends to curb its availability going [*433] forward. n24 Considering that when it comes to persons arrested in the United States the government already relies primarily on criminal prosecution even with respect to al Qaeda suspects, n25 these developments suggest that the DOJ will continue to bear a large share of the burden when the decision is made to incapacitate a suspected terrorist within the United States in the future. This, in turn, will sustain or even enhance the pressure on the DOJ to push the envelope with respect to its capacity for early intervention in such cases.

B. The Early Intervention Dilemma

Assuming that there is at least a preference within the DOJ for "forward-leaning - preventive - prosecutions," n26 difficult questions arise. On the one hand, seeking to maximize early intervention in terrorism cases entails plausible and significant benefits. The sooner that one moves to incapacitate a potential terrorist, the less risk one runs that the person will slip surveillance or otherwise get into position to commit a harmful act before officials can intervene. n27 Even if the risk enhancement associated with delay is relatively small, the magnitude of the harm to be averted in [*434] the terrorism context - from the perspective of both the individuals who may be subjected to violent acts and society - may be such that any appreciable risk enhancement should be avoided if at all possible.

On the other hand, there are a variety of offsetting costs associated with a policy of maximizing early stage prosecution. From the national security perspective, these costs are at least three-fold. First, and most significantly, overt intervention in the form of a prosecution pre-

sumably will end any covert intelligence-gathering program that may have been in place with respect to the defendant; opportunities to monitor frank communications, to identify confederates, and to learn a variety of other critical facts will largely come to an end at that point. n28 Thus, some have argued that security goals frequently will be better served by delaying prosecution as long as possible. n29 The second point is closely related: ongoing observation does not merely serve to collect intelligence, but may also yield additional evidence that will enhance the prospects for success at trial. A delayed prosecution in this sense may be a more viable prosecution, perhaps significantly so. The third and final point follows from the second: to the extent that an early stage prosecution is perceived as unjustified, it may have a negative impact on the willingness of members of a critical community - such as Arab-or Muslim-Americans - to cooperate with intelligence and criminal investigators. n30

Early stage prosecution also entails significant civil liberty concerns. This point is well illustrated in the movie version of Philip K. Dick's short story *The Minority Report*, n31 which envisions a future in which government officials believe that they have developed the ultimate form of preventive criminal law enforcement. By relying on the visions of a trio of seemingly unerring psychics, police are able to consistently detect crime before it occurs, sometimes even before the perpetrator begins to contemplate the course of conduct that would lead to the offense. "Precrime," as it is called, appears to be the realization of a law enforcement fantasy: all criminal [*435] harms are averted, n32 without any false positives in the form of persons wrongly accused. Or so it seems at first. Suffice to say that events soon call into question the accuracy of the predictions, suggesting in dramatic fashion that there is no avoiding the cost-benefit tradeoff between crime prevention measures and the risks of false positives.

To a certain extent, of course, the problem of false positives cannot be avoided. It is a risk that is inherent in the task of criminal prosecution, whether prevention-oriented or not. But the degree of risk is not uniform across all types of criminal liability. The farther that one moves from the paradigm of a completed act - as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth - the more tenuous the link between the defendant and the anticipated harm becomes and, hence, the more likely it is that false positives will be generated.

Concerns under this heading appear to have sparked the recent surge in interest in the government's capacity for anticipatory prosecution. Writing in the *Washington Post*, for example, Dahlia Lithwick argued that federal prosecutors may run too great a risk of false positives in their efforts to intervene at the aspirational-but-not-operational stage. n33 Invoking the imagery of *The Minority Report*, Lithwick contends that early stage intervention as practiced in the Miami Seas of David arrests approaches the criminalization of mere thoughts, and might strike the wrong balance between the benefits of preventive action and the risks that defendants will be prosecuted for acts that they might never actually have committed. n34 In short, there is an inherent tension between the costs and benefits associated with preventive interventions in general, a tension that grows [*436] sharper the earlier that the intervention occurs. Whether it is wise in light of this tension to maximize early intervention is, for the most part, a question of policy rather than of law . . .



Workbook

Conspiracy & Complex Investigations No. 55

The Extraterritorial Aspects of Complex Conspiracies: the Burmese Billionaire, U.S. Anti- Terrorism Laws, & Considerations on the *Early Intervention Dilemma*

March 3, 2010

Legal Training Section
DEA Training Academy
Quantico, Virginia

Conspiracy & Complex Investigations Workbook

1. **Extraterritoriality.** Describe what is meant by the term *extraterritorial effect* as in “our law applies to the behavior of foreign persons in foreign countries (or otherwise outside the territorial jurisdiction of the United States) if our law has extraterritorial effect.”
 - a. International acceptability is essential; for our purposes there are 3 Customary International Law (CIL) acceptable norms:
 - i. Territorial (all persons & things & effects within a nation’s territory are subject to its laws).
 - ii. Nationality (nations may exert jurisdiction over their citizens in their territory and everywhere else, as well as over vessels and aircraft, a nation “flags”).
 - iii. Protective (nations may criminalize activities that occur outside their territory but which have an adverse effect on their national security or the operation of their government).
 - b. Reciprocity (another way of saying *these* CIL norms *are* accepted). What is reciprocity?

§ 952. Importation of controlled substances

- (a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or ephedrine, pseudoephedrine, or phenylpropanolamine, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

§ 955. Possession on board vessels, etc., arriving in or departing from United States

It shall be unlawful for any person to bring or possess on board any vessel or aircraft, or on board any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States, a controlled substance in schedule I or II or a narcotic drug in schedule III or IV, unless such substance or drug is a part of the cargo entered in the manifest or part of the official supplies of the vessel, aircraft, or vehicle.

§ 959. Possession, manufacture, or distribution of controlled substance

- (a) Manufacture or distribution for purpose of unlawful importation

It shall be unlawful for any person to manufacture or distribute a controlled substance in schedule I or II or flunitrazepam or listed chemical—

(1) intending that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States; or

(2) knowing that such substance or chemical will be unlawfully imported into the United States or into waters within a distance of 12 miles of the coast of the United States.

2. U.S. drugs laws that have extraterritorial effect.

Identify Federal drug laws that have *extraterritorial effect*.

- a. Examples of *certain* provisions of the Controlled Substances Act that have extraterritorial effect.
 - i. Controlled substances +?
 - ii. Unlawful to import into the United States from outside thereof . . . 21 U.S.C. § 952.
 - iii. Possession (on board a vessel, aircraft or carrier) arriving or departing the United States . . . 21 U.S.C. § 955.
 - iv. The “Burmese Billionaire” and his ilk; manufacturing, distributing and possession with intent to distribute, *intending or knowing* the controlled substances will be unlawfully imported into the United States (behavior occurs outside U.S. territory, intended effect is within U.S. territory) . . . 21 U.S.C. § 959(a).

§ 960a. Foreign terrorist organizations, terrorist persons and groups

(a) Prohibited acts

Whoever engages in conduct that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22), shall be sentenced to a term of imprisonment of not less than twice the minimum punishment under section 841(b)(1) of this title, and not more than life, a fine in accordance with the provisions of Title 18, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subsection shall include a term of supervised release of at least 5 years in addition to such term of imprisonment.

(b) Jurisdiction

There is jurisdiction over an offense under this section if—

(1) the prohibited drug activity or the terrorist offense is in violation of the criminal laws of the United States;

(2) the offense, the prohibited drug activity, or the terrorist offense occurs in or affects interstate or foreign commerce;

(3) an offender provides anything of pecuniary value for a terrorist offense that causes or is designed to cause death or serious bodily injury to a national of the United States while that national is outside the United States, or substantial damage to the property of a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions) while that property is outside of the United States;

(4) the offense or the prohibited drug activity occurs in whole or in part outside of the United States (including on the high seas), and a perpetrator of the offense or the prohibited drug activity is a national of the United States or a legal entity organized under the laws of the United States (including any of its States, districts, commonwealths, territories, or possessions); or

(5) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States.

(c) Proof requirements

To violate subsection (a) of this section, a person must have knowledge that the person or organization has engaged or engages in terrorist activity (as defined in section 1182(a)(3)(B) of Title 8) or terrorism (as defined in section 2656f(d)(2) of Title 22).

2. U.S. drugs laws that have extraterritorial effect.

Identify Federal drug laws that have *extraterritorial effect*.

b. New kid on the block: 21 U.S.C. § 960a – “Foreign terrorist organizations, terrorist persons and groups”

- i. Whoever commits an offense which is punishable under § 841 if committed within the jurisdiction of the United States;
- ii. *Knowing or intending to provide* “anything of value;”
- iii. To any person or organization that *has engaged in or engages in* terrorist activity or terrorism;

1. Basis for jurisdiction over the defendants:

- a. Drug activity or terrorist offense is in violation of U.S. law;
- b. The offense occurs in or affects interstate or foreign commerce;
- c. An offender provides anything of value to for a terrorist offense (that harms Americans or American interests outside the U.S.);
- d. Perpetrator is a U.S. national (or legal entity) and the offense or drug activity occurs in whole or part outside the U.S.;

or

- e. The offender is brought to or found in the United States after the offense occurs.

2. Proof requirement: the offender who commits the acts in 2.b.i-iii, above, “must have knowledge that the person or organization has engaged or engages in terrorist activity or terrorism.”

§ 70503. Manufacture, distribution, or possession of controlled substances on vessels

(a) Prohibitions.—An individual may not knowingly or intentionally manufacture or distribute, or possess with intent to manufacture or distribute, a controlled substance on board—

(1) a vessel of the United States or a vessel subject to the jurisdiction of the United States; or

(2) any vessel if the individual is a citizen of the United States or a resident alien of the United States.

(b) Extension beyond territorial jurisdiction.—Subsection (a) applies even though the act is committed outside the territorial jurisdiction of the United States.

2. U.S. drugs laws that have extraterritorial effect.

Identify Federal drug laws that have *extraterritorial effect*.

c. The Maritime Drug Law Enforcement Act.

- i. Vessel of the United States.
- ii. Vessel *subject to the jurisdiction* of the United States.
- iii. Elements of the offense: knowingly or intentionally, manufacture or distribute or possess with intent to distribute . . . where?
- iv. Foreign-flagged vessels and consent.
- v. False claims or failure to make a claim.
- vi. Vessels in U.S. customs waters.
- vii. Vessels in another nation's territorial waters.

§ 2339. Harboring or concealing terrorists

(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

(b) A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

3. U.S. anti-terrorism laws with extraterritorial effect.

Describe what *behavior* is unlawful with respect to four international terrorism offenses under U.S. law if our investigative target is involved in international terrorism as well as CSA offenses.

- a. Harboring terrorists.

§ 2332b. Acts of terrorism transcending national boundaries

(a) Prohibited acts.—

(1) Offenses.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

(2) Treatment of threats, attempts and conspiracies.—Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.—

(1) Circumstances.—The circumstances referred to in subsection (a) are—

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;

(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

(2) Co-conspirators and accessories after the fact.—Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

3. U.S. anti-terrorism laws with extraterritorial effect.

Describe what *behavior* is unlawful with respect to four international terrorism offenses under U.S. law if our investigative target is involved in international terrorism as well as CSA offenses.

- b. Acts of terrorism transcending national boundaries.

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.—

(1) **Unlawful conduct.**—Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

§ 2339D. Receiving military-type training from a foreign terrorist organization¹

(a) **Offense.**—Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (c)(4)), that the organization has engaged or engages in terrorist activity (as defined in section 212 of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

(b) **Extraterritorial jurisdiction.**—There is extraterritorial Federal jurisdiction over an offense under this section. There is jurisdiction over an offense under subsection (a) if—

(1) an offender is a national of the United States (as defined in 101(a)(22)² of the Immigration and Nationality Act) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act);

(2) an offender is a stateless person whose habitual residence is in the United States;

(3) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(4) the offense occurs in whole or in part within the United States;

(5) the offense occurs in or affects interstate or foreign commerce; or

(6) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense

3. U.S. anti-terrorism laws with extraterritorial effect.

Describe what *behavior* is unlawful with respect to four international terrorism offenses under U.S. law if our investigative target is involved in international terrorism as well as CSA offenses.

c. Providing material support.

d. Receiving military-type training.

4. Investigative activities in foreign countries. Identify three investigative activities in foreign countries that can produce evidence for United States prosecutions.

- a. Cooperative activities with other Federal law enforcement agencies (LEAs) that are working in the foreign country.
- b. Cooperative activities with foreign nation LEAs.
 - i. Wiretaps under foreign law and proof in U.S. courts.
 - ii. Physical searches. (El-Hage). A search by U.S. agents of El-Hage's home in Kenya in conjunction with Kenyan authorities pursuant to a Kenyan warrant does not require a U.S. warrant; this search was reasonable under the 4th Amendment. *In re TERRORIST BOMBINGS IN EAST AFRICA*, 548 F.3d 276 (2nd Cir. 2008).

(b)(7)(E)

5. Handling sensitive information. Identify three ways to protect sensitive DEA information in prosecutions when that information must not be disclosed in court (or in any document subject to standard discovery rules). The information we are talking about cannot be revealed because to do so would expose sensitive DEA sources and methods used to collect the information in foreign nations.

a. One way, the tried and true way: structure the case so that it is not necessary to use the sensitive DEA information in a prosecutor's case.

i. Prosecutions in the United States.

ii. Prosecutions in other countries.

b. Non Responsive

5. **Handling sensitive information.** Identify three ways to protect sensitive DEA information in prosecutions when that information must not be disclosed in court (or in any document subject to standard discovery rules). The information we are talking about cannot be revealed because to do so would expose sensitive DEA sources and methods used to collect the information in foreign nations.

c. A third way is to classify the information, for example, information DEA receives from a *foreign* government, which requests it be classified, must be classified by DEA; DEA has authority to classify information in accordance with standard national security classification guidelines/regulations. Then, pre-trial, use the Classified Information Procedures Act (CIPA) to protect as much of it as is possible in a prosecution in the United States. What cannot be protected:

i. Evidence that is material and relevant to a defense to the charges against the defendant.

ii. Evidence the courts determine is necessary for the defendant to have a fair trial.

6. **Considerations on the *Early Intervention Dilemma*.**

The early intervention dilemma is a problem faced by both law enforcement and intelligence agencies. It can best be expressed with the question: “when is the right time to take this investigation down?” What follows are several newspaper articles highlighting recent experiences in cooperative law enforcement/intelligence investigations into suspected terrorist’s activities. The dilemma of the right time to take down the investigation has added importance when these two entities work together and especially when terrorists are their target. The last item is a portion of a law review article that further explains the early intervention dilemma.

- a. London: police kill an innocent person believed to be a suicide bomber.
- b. London: police say it could happen again.
- c. London: explaining the inexplicable.
- d. London: reacting when overtaken by events.
- e. England and America: the blame game afterwards.
- f. London: preventing airliners from exploding in mid-air.
- g. Australia: acting to save lives.
- h. The Early Intervention Dilemma: a legal explanation.

LESSON PLAN
UPDATE and RE-CERTIFICATION 2010

Office of Chief Counsel
CCT

Lesson Plan Number: LIS 119

Lesson Plan Title: The Burmese Billionaire, U.S. Anti-terrorism Law & Considerations
on the Early Intervention Dilemma

This lesson plan accurately reflects both the content and methods of instruction, and contains test questions as well as copies of all visual aids and/or handout material used in the presentation of this class. I certify that:

- ☒ This lesson plan accurately reflects the contents of this course and has not changed since its last update. *The handouts are new.*
- ☐ This is a revised lesson plan, and all revisions or updates to this previously approved lesson plan have been typed in **bold print**.
- ☐ All test questions associated with this lesson plan have been reviewed for accuracy and are consistent with the content and goals of this block of instruction.
- ☐ Electronic Media contained on CD.

(b)(6)

Associate Chief Counsel Signature & Date

(b)(6)

Signature & Date